PREVENTING TERRORISM OR SUPPRESSING DISSENT: EXAMPLE OF RUSSIA AND TURKEY THROUGH THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

Anti-terrorism is essential for the modern society to be able to prevent heinous crimes of terrorism from happening and avoid its destructive consequences. In applying anti-terrorism measures, states are permitted to restrict human rights, however, there are limits to such restrictions. International and regional bodies, such as the UN and the European Court of Human rights, provide guidance on the balance between human rights protection and security considerations. However, such norms are still vague, and states have an opportunity to use the most restrictive measures in the domain of anti-terrorism. Moreover, some states tend to "repurpose" anti-terrorism measures to suppress dissent in their societies. The purpose of this thesis is to look into ways, how the states may misuse anti-terrorism to silence opposing voices through the comparative analysis of national legislation and practice of Turkey and Russia in light of the case-law and standards of the European Court of Human Rights (ECtHR). The main focus is on the infringement on the rights enshrined in Art. 10 and Art. 11 of the European Convention on Human Rights by anti-terrorism measures. The main finding is that the ECtHR is quite successful in balancing of anti-terrorism measures and human rights protection standards, however, it avoids addressing the more systematic problem of misuse of such measures.

Introduction

While the notion of international terrorism and the need to combat is not new, the 9/11 attack in the United States in 2001 opened up a new dimension of a terrorist threat, and showed how devastating can terrorism be. Faced with this challenge, the international community, international and regional organizations, as well as separate states undertook efforts to address the problem of terrorism, shifting focus from punishment to prevention of such catastrophes. However, it soon became clear that the states could use anti-terrorism law for a different purpose. Already in 2002, it was noted by the Special Representative of the UN Secretary-General on human rights defenders that "there is a real danger that, in the wake of the terrorist attacks of 11 September 2001, some Governments may be using the global war on terrorism as a pretext to infringe human rights".[1] She has also expressed concern that "[i]n the post-11 September climate, Governments … have an easier time in portraying anyone who disagrees with them or expresses any form of criticism as a dissident and subversive or even as aiding and abetting "foreign terrorists".[2] There is a reasonable concern that the infringement on human rights can not only be an "accidental" effect of the counter-terrorism regime, but that the states would intentionally use anti-terrorism measures to suppress dissent, and to target civil society organizations and opposition political parties. This work aims to analyze how preventive anti-terrorism measures can be repurposed by the states to silence dissent on the example of Russia and Turkey, and the possibility of addressing such misuse through the case law of the European Court of Human Rights.

[1] Commission on Human Rights, *Report submitted by Ms. Hina Jilani, Special Representative of Secretary-General on human rights defenders*, 27 February 2002, E/CN.4/2002/106, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/111/22/PDF/G0211122.pdf?OpenElement, Para. 96

[2] Ibid, Para. 104

Terrorism, undeniably poses a threat to national security, and in case of the terrorist attacks, contributes to the human rights violation of the victims, most of all – potentially infringing on the right to life.[3] A number of international bodies have underlined the state's positive obligation to protect people and their fundamental rights against terrorism.[4] Moreover, terrorism also poses a threat to democratic regime of a state, to its institutions and its values, as it promotes violent measures to achieve political or social change.[5] The state must, therefore, effectively respond to terrorism, and undertake steps to prevent terrorist attacks from happening in the first place. Anti-terrorism measures may infringe on, and usually have some effect on human rights and freedoms. As a rule, the state can justify limitations of human rights (except from non-derogable ones) by the fight against terrorism. There are several "modes" of such limitations: for example, the European Convention on Human Rights (ECHR) provides that the rights can be limited in name of state security, prevention of crime, for protection of rights of others, etc. (limitation clauses in Art. 8-11 of the ECHR), as well as in state of emergency (Art. 15), or to prevent the abuse of Conventional rights (Art. 17).[6] However, such limitations should not be disproportionate, and should only be used for the purposes they are supposed to serve, namely – to fight terrorism. Therefore, it is important to be able to recognize when states overstep the permissible boundaries and start using anti-terrorism as a pretext to achieve other aims, namely target the dissenters. While states may employ a wide variety of measures to achieve such aims (e.g. prolonged detentions, unfair prosecutions on terrorist-related charges, etc.), however, their ultimate goal is to silence the

[3]UN High Commissioner for Human Rights, Report "Human Rights: a uniting framework, **,** 27 Feb 2002, http://repository.un.org/bitstream/handle/11176/238906/E_CN.4_2002_18-EN.pdf?sequence=3&isAllowed=y

[4] E.g., Council of Europe: Committee of Ministers, *Guidelines on human rights and the fight against terrorism,* 11 July 2002, http://hrlibrary.umn.edu/instree/HR%20and%20the%20fight%20against%20terrorism.pdf, , Art. 1

[5] Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Bloomsbury Publishing, 2008), 5.

[6] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended,* 4 November 1950, ETS 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf

critique and dissent. This has direct implications on freedom of expression and freedom of assembly and association.

The work focuses on the effects of anti-terrorism laws on freedom of expression and freedom of assembly in Russia and Turkey through the case law and standards of the European Court of Human Rights. Russia and Turkey present an interesting example for analysis, as both countries have been fighting domestic terrorism for a long time. With the existence of violent domestic groups on their territory, the threat of terrorist activities is perceived to be not just "imaginary", but quite real. At the same time these countries have very strong political regimes, known for suppressing dissent and silencing political opponents. It is important to observe when the anti-terrorism measures are used within the boundaries of permissible limitations, and how can they be repurposed and misused by the governments. As both of these countries are a part of the Council of Europe, they should adhere to the CoE standards. Through the case-law of the ECtHR, it could be seen whether the countries adhere to such standards, and also whether the Court itself is able to recognize the misuse of anti-terrorism measures and effectively address this.

The work consists of three Chapters. *Chapter 1* shows the interrelation between human rights and prevention of terrorism. In particular, it addresses different permissible modes that the states can use to prevent terrorism, and shows how states may overstep their boundaries. The rules and standards of terrorism prevention and possible limitations of human rights under the UN system and the Council of Europe system will also be addressed.

Chapter 2 analyzes national anti-terrorism and anti-extremism legislation in Turkey and Russia, focusing on the definition of terrorism/extremism, and on the provisions on terrorist organizations and on terrorism propaganda. Examples of implementation of such legislation will also be showed.

Chapter 3 focuses on the standards of the ECtHR in regard to anti-terrorism and rights under Art. 10 (freedom of expression) and Art. 11 (freedom of assembly and association) through the cases from Turkey and Russia. The conclusions are drawn as to the effectiveness of the ECtHR to recognize and address the instances of misuse of the anti-terrorism measures.

Chapter 1 Preventing terrorism: security and human rights

Combatting terrorism is a complicated task for states. The idea of using violence by insurgents, political and religious groups, and even by the states as a tool to influence the society, to undermine the authority of some group (or the government), and to achieve necessary goals is by no means new. However, globalization, development of new and faster ways of communication, emergence of multi-national highly-organized terrorist groups with vast resources (Al-Qaeda, Islamic State of Iraq and Syria (ISIS)) seem to give terrorism a new international "dimension". The 9/11 attacks in the United States, that caused the loss of thousands of lives, were a grim example of the dangers of international terrorism. After the attacks, states around the globe, as well as international and regional organizations (the United Nations, the Council of Europe, etc.), began to modify the existing anti-terrorism regulations and measures, and adopt new ones to address these challenges, and focus on the prevention of terrorist acts. Anti-terrorism started to become more and more "preventive", as the focus shifted from addressing the consequences of terrorist acts to trying to stop such acts from happening.

1.1 Terrorism prevention and human rights: conflicting relationship

Terrorism, undeniably, poses a threat to national security, and terrorist activities often contribute to human rights violation of the victims (the clearest example, probably, being the right to life).[7] The states, in turn, should ensure that people under their jurisdiction enjoy fundamental rights and freedoms.[8] It should be noted, that a number of international bodies have underlined the states have positive obligation to protect people and their fundamental rights against terrorism.[9] It

[7] Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Bloomsbury Publishing, 2008), 3.
[8] E.g., Art. 2 s. 2 of the ICCPR, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),
[9] E.g., Council of Europe: Committee of Ministers, *Guidelines on human rights and the fight against terrorism*, 11 July 2002, http://hrlibrary.umn.edu/instree/HR%20and%20the%20fight%20against%20terrorism.pdf, Art. 1

leads to the conclusion that states should create response to terrorism, and such response should effectively provide real protection of human rights. In theory, preventive measures should allow states to stop terrorist acts from happening, and by this avoid potential violations of human rights. At the same time, preventive anti-terrorism measures can be, and usually are restrictive on human rights, stripping people from the afforded protection in the name of security. Therefore, there is a need to find a fair balance between these two conflicting, and at the same time interconnected ideas: the need to fight terrorism to protect human rights and the need not to disproportionally restrict human rights in the name of anti-terrorism.[10] In order to understand and be able to identify, whether the employed anti-terrorism measures encroach on human rights, it is necessary to explore the permissible limitations of such rights, and the regimes that the states can use in response to terrorism.

Terrorist attacks, or even the possibility of such, may create a need for the government to employ a regime of emergency. Generally speaking, in times of crisis states can use special measures, not permitted in "normal" course of events, to be able to effectively address such crises. The major human rights instruments (ICCPR, ECHR) allow for states to derogate from their human rights obligations (except from non-derogable rights) during emergencies, meaning that the states can limit human rights, though not unrestrictedly, but only to a degree necessary in the concrete situation.[11] Moreover, the provisions regulating the state of emergency are usually included in national constitutions (or in national legislation). Depending on the country, emergency powers can be entrusted to the executive branch, which can act at its discretion, or the legislative branch

[10] Sottiaux, *Terrorism and the Limitation of Rights*, 6–7.
[11] ICCPR, Art. 4 (1,2), ECHR, Art. 15, UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, http://www.refworld.org/docid/453883fd1f.html

forms a system of norms for the executive to follow, leaving a right to check such actions.[12] In the context of terrorism, the emergency regime may be applied either when the terrorist act has already happened, to deal with the consequences, or if there is information about a possible act, with the purpose of its prevention. It should be noted that the notion of emergency is supposed to be of a temporary character. Thus, the state of emergency should be limited in time, and the government should go back to its ordinary operating regime, as soon as the emergency ends (or its consequences are dealt with), therefore usually the "holders of emergency powers" could only issue temporary measures, and are not allowed to make law.[13] However, the nature of modern terrorist threat is so extensive that it can be interpreted as being a "permanent emergency".[14] This "permanency" has a potential to disrupt the established norms and to allow states to use restrictive measures for almost indefinite amount of time. A clear example of this is France, where the state of emergency was declared by then-president François Hollande in 2015, following the attacks in Paris, and extended by the French Parliament for a total of six times, being in place for almost two years.[15] During these two years, extraordinary measures, such as unwarranted searches, prolonged detentions, etc., were used.[16] Moreover, the state of emergency in France has been replaced with quite restrictive counter-terrorism laws, the provisions of which resemble the measures, used under the state of emergency.[17] This example shows how the provisional in their essence measures were

[12] András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017), 421.
[13] John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (April 1, 2004): 212, https://doi.org/10.1093/icon/2.2.210.
[14] Aniceto Masferrer, *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer Science & Business Media, 2012).
[15] Yasmeen Serhan, "Will France's State of Emergency Become Permanent?", The Atlantic, 11 July 2017, https://www.theatlantic.com/international/archive/2017/07/will-frances-state-of-emergency-become-permanent/532848/
[16] Samuel Osborne, *"France declares end to state of emergency almost two years after Paris terror attacks"*, The Independent, 31 October 2017, http://www.independent.co.uk/news/world/europe/france-state-of-emergency-end-terror-attacks-paris-isis-terrorism-alerts-warning-risk-reduced-a8029311.html
[17] Ibid

used for a prolonged period of time, without any limitations from the Parliament, and then, instead of being repealed after the "return to normalcy", were secured in the new legislation. It should be said that the rules of emergency as such are necessary for the situations of duress, to give states a chance to protect itself and restore the order as fast as possible. However, there is a problem when such measures are used by states as a legitimate excuse not to adhere to constitutional norms and human rights obligations, and such situations should be monitored closely.

Terrorism, undoubtedly, presents a threat to democracy, and both terrorist actions and the government's reactions (and sometimes – overreactions) to them could undermine and destabilize democratic institutions and values.[18] Governments, therefore, could employ measures of "militant" democracy to prevent this from occurring. "Militant" democracy, "a constitutionally legitimized departure from "ordinary" constitutionalism", allows preventing the rise of regimes that present a danger to democracy (e.g. totalitarian political parties, fundamental religious movements, etc.) by employing specific restrictions on some freedoms (e.g. expression, assembly).[19] The most famous example for that is probably, the provision in German Basic Law, regulating that political parties which "seek[s] to undermine or abolish the free democratic basic order or to endanger the existence of [German state]" should be proclaimed unconstitutional.[20] Dissolution of political parties is not usually acceptable in a democratic society, as the freedom of association is one of the most important freedoms for development of democracy and should be respected. However, states can be allowed to use such non-democratic measures, if they serve the purpose of preserving democracy. Thus, both ICCPR and ECHR contain similar provisions that do not allow for states or groups to be involved in activities aimed at the "destruction" of rights, secured by these

[18] Sottiaux, *Terrorism and the Limitation of Rights*, 5.
[19] Andras Sajo, "From Militant Democracy to the Preventive State," *Cardozo Law Review* 27 (2006 2005): 2262.
[20] *Germany: Basic Law for the Federal Republic of Germany* [Germany], 23 May 1949, available https://www.btg-bestellservice.de/pdf/80201000.pdf, Art. 21 (2)

instruments.[21] Such provisions allow states to justify restrictions on extremist political parties, fundamentalists movements, etc.[22] It should be said that "militant" democracy measures are quite specific and are usually applied to a narrow group of actors, only to those who may undermine democracy. However, currently states, under the pretext of fight against terrorism, may employ such measures to restrict rights and to target wider groups.[23] Thus, "militant democracy" measures used in a context of terrorism prevention may give rise to a "counter-terror" state, where every person is affected by such measures, as everyone is seen to be "at least to a small extent, [a] potential terrorist".[24] As a result, instead of protecting democracy, anti-terrorism measures undermine it and contribute to curtailing of human rights. It is important to realize the threat that is hidden in overbroad application of anti-terrorism measures, and be able to recognize misuse of such measures by the governments.

Speaking about the relationship between anti-terrorism measures and human rights, one important point should be mentioned briefly.The human rights in their majority are not absolute, and a lot of them could be limited. For example, the "classical freedoms" such as freedom of expression and freedom of association have "limitation clauses", that allow the restriction of such rights for a number of reasons – state security, protection of public order, protection of rights of others, etc.[25] In the fight with terrorism and for its prevention, therefore, the states may invoke allowed rationales to justify the restrictions, and secure such limitations in national legislation. While this is generally permissible, there are particular standards for the limitations, which may help notice disproportionate use of preventive measures.

[21] ICCPR, Art. 5 (1), ECHR, Art. 17
[22] Sajo, "From Militant Democracy to the Preventive State."
[23] Sajo, 2268–70.
[24] Sajo, 2270.
[25] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011), 68–69.

Terrorism prevention measures are widely implemented in modern states, as well as on the international level. This is understandable, as such measures help prevent terrorist acts from happening, help identify terrorist groups, and eventually help save lives and protect rights of people. However, there are also more pragmatic reasons for such implementation. For example, governments and politicians are aware that terrorist attacks bear reputational risks for them, so they often choose to "exaggerate" the probability of attacks and undertake more restrictive measures not only to prevent the attacks, but also to "protect themselves from [potential] criticism".[26] People, in turn, are often ready to give up their freedoms in exchange for security,[27] even though such restrictive measures are not necessarily effective and can bring a false feeling of protection. It seems that the invasive preventive anti-terrorism practices are being normalized in modern societies, which is not a positive trend, and will inevitably narrow down the scope of human rights protection. This calls for a higher level of scrutiny of anti-terrorism measures by courts and international bodies, which should be able to uncover the mis-use of such laws, and find a proper balance between human rights obligations of the state and security considerations.

1.2 Terrorism prevention and human rights: the UN norms and standards

Despite lack of coherent definition of terrorism, there are a number of international and regional treaties, resolutions and other documents, that regulate relevant measures on combatting terrorism. Some of these documents regulate criminalization of the specific conduct related to terrorism (e.g. hijacking of an aircraft, taking hostages, attacks against protected personnel such as diplomats, etc.), including the requirement for states to introduce the "try-or-extradite" regime for such conduct, to prevent impunity for terrorist acts.[28] Additionally to the specific terrorist acts

[26] Michael Hamilton, "The Misrule of Law? 'Terrorist Speech', Human Rights and the Legal Construction of Risk," in *Terrorism and the Rule of Law* (Budapest: HVG-ORAC Books, 2015), 151, https://ueaeprints.uea.ac.uk/41755/.
[27] Sajó and Uitz, *The Constitution of Freedom*, 440.
[28] Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, 128.

being outlawed, there are documents that regulate measures aimed at prevention of such acts from occurrence, either by introducing specific measures (e.g. against financing of terrorist organization) or expanding the existent measures to tackle terrorist threats (e.g. enhanced surveillance). The main international regulations on anti-terrorism, and their interrelationships with the states' human rights obligations are discussed in this part.

Terrorism prevention measures can have many forms and are usually aimed at different aspects of terrorist activities. There are different ways to categorize such measures, but for the purpose of this work, they can be formed into three groups: prevention of financial support for terrorist organizations, "physical" restriction of movement of individual terrorists and suspects (preventive detentions, no-fly lists), and influencing the means of communication and dissemination of information among terrorist organizations and the general public (advocacy prohibition laws, restrictions on the activities of organizations). While such measures are, undoubtedly, necessary for suppression of terrorist activities, they also infringe on human rights, and may have accidental or intentional restrictive effect on people and groups, not involved in terrorism. It is important, therefore, to know the standards and permissible restrictions of human rights to be able to realize, when such boundaries are being overstepped. Particular attention should be paid to the direct or indirect effect on freedom of expression and freedom of association, as restriction of these freedoms may ultimately help government silence not only those, who are involved in terrorist activities, but also dissenters and opposition.

Before going into details about the specific anti-terrorism measures and their effect on human rights, it is important to notice that there is a general framework of permissible restrictions of human rights, that the state may rightfully employ. Thus, the possible restrictions on the freedom of expression and association can be found in universal human rights instruments, such as the

International Covenant on Civil and Political Rights (ICCPR).[29] The provision of Art. 19 (3, b) allows for limitations on freedom of expression for the protection of national security, a similar provision of Art. 21 allows limitations on the freedom of association "in the interests of national security or public safety". Such measures should be provided by the law and they are necessary in a democratic society – standard requirement for the limitation of some human rights. Moreover, Art. 20 (2) of the ICCPR states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" should be outlawed. Even though such restrictions are not directed at terrorist speech or terrorist organizations, it is clear that they can be used by governments in the domain of anti-terrorism legislation.

In absence of all-encompassing document on terrorism, specific measures related to separate aspects of terrorism, including those aimed at its prevention, can be found in a number of the UN provisions. One of the examples is the prohibition of incitement, coming from the only UN organ with the powers to issue resolutions, obligatory for states to implement – the UN Security Council (UNSC). Thus, Resolution 1624 (2005) calls states to adopt measures to prohibit incitement to commit terrorist acts, as well as measures "to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters".[30] It should be mentioned that the UNSC does not provide any definitions or explanations of what constitutes incitement, or what are appropriate measures to address any of the mentioned issues. The only "guideline" that Res. 1624 provides is that such measures should be necessary and appropriate, and that states should act in accordance with their international law obligations, including human rights law, refugee law and humanitarian law.[31] The provisions of Res. 1624 have clear impact on both freedom of

[29] ICCPR, Art. 19
[30] UN Security Council, *Security Council resolution 1624* (2005) [on threats to international peace and security], 14 September 2005, S/RES/1624 (2005), Para. 1(a), Para 3.
[31] Ibid, Para. 1

expression and freedom of association. In the absence of clear definitions, the states can use overbroad and/or vague terms to describe the offences of "incitement" or "subversion", that could cover not only terrorist organizations, but also those who do not support their governments, therefore potentially providing states with tools to suppress dissent.

It is important to note the problematic issue of the interrelation and hierarchy between the SC Resolutions and the human rights instruments, such as ICCPR. As mentioned before, the SC is the only UN body that can adopt resolutions that states are required to follow. Therefore, if, for example, there are requirements to outlaw incitement to terrorism, or more general provisions on terrorism prevention stemming from the SC Resolution, the states should comply with them. While it is obvious that states cannot violate non-derogable rights by virtue of the nature of such rights (e.g. states cannot use torture and other inhuman treatment on terrorist suspects/terrorists), there are less clear standards when it comes to the rights that can be lawfully limited even when there is no threat of emergency or terrorist attack, such as freedom of expression and association. These issues are often addressed by other UN bodies and experts. For example, in 2010, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism proposed "Ten areas of best practice in countering terrorism", where he highlighted the importance and included, among others, a definition of incitement.[32] However, such proposals, obviously, do not have the same legal force as the SC Resolution, and states are not obliged to follow these guidelines. Therefore, the issue may arise, when states are not only permitted, but actually obliged to infringe on human rights because of their obligation under the UNSC resolutions.

[32] UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: ten areas of best practices in countering terrorism*, 22 December 2010, A/HRC/16/51

To show the example of possible tensions between the rules, established, by the UNSC and states' human rights obligations, another kind of anti-terrorism measure should be mentioned. Thus, the creation of a list of persons associated with terrorist organizations, and imposition of sanctions against such people was established by the UNSC and has caused a lot of legal uncertainty. The creation of the list was first aimed at persons associated with the Al-Qaida organization, however in recent years, the list was expanded to include persons, associated with ISIS.[33] The possible sanctions for the persons, included in this UN Sanctions list (maintained by the special UN SC Committee), are assets freeze and travel ban.[34] As the SC has adopted these individualized sanctions, and the persons who allegedly had connections with Al-Qaida terrorist organization had been added to the list, states were required to implement these sanctions. However, as states started imposing travel restrictions, it became clear that there were no open and comprehensible procedures for listing, and especially de-listing an individual. So, on the one hand, states were implementing the mandatory provisions of the SC resolution, but on the other, as the primary bearers of human rights obligations, they were not fulfilling their responsibility and were not providing appropriate remedies for the persons, claiming their inclusion to the list was a mistake. This resulted in a number of cases before international bodies, including UN Human Rights Committee, the European Union's Court of Justice and the European Court of Human Rights.[35] These cases address the issue of the conflict between state's obligation between different systems, and try to resolve such tensions. For example, in *Nada v. Switzerland* the ECtHR stated

[33] UN Security Council, *Resolution 1267 (1999) [Afghanistan]*, 15 October 1999, S/RES/1267 (1999) at https://undocs.org/S/RES/1267(1999), and subsequent resolutions (including Res. 1333 (2000), 1363 (2001), 1373 (2001), with the last Res. 2368 (2017))

[34] UN, Sanctions List Materials, https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list

[35] E.g.: UN Human Rights Committee, *Nabil Sayadi and Patricia Vinck v. Belgium*, 29 December 2008, CCPR/C/94/D/1472/2006; European Court of Justice (Grand Chamber), *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, Joint cases C-402/05 P and C-415/05 P, 3 September 2008; European Court of Human Rights (Grand Chamber), *Nada v. Switzerland*, App. no. 10593/08, 12 September 2012

that even though the rules on the travel ban stemmed from the UNSC, it was Switzerland, that was responsible for their application and for possible human rights violations.[36] The Court also said that in situations when there is conflict between obligation under two different systems, the state should "harmonize" such obligations as far as possible.[37] Citing *Kadi*, the Court highlighted that the fact that a particular measure comes from the UNSC does not exclude such measure from the judicial review on compliance with human rights.[38]As it could be seen, the states can be held responsible if they implement UNSC measures without the reflection on how they may affect human rights. It should be noted, that the shortcomings of these SC Resolutions were addressed in later resolutions: it was allowed for the persons/organizations on the list to submit their requests for de-listing, more clear criteria were worked out as to processes of listing and de-listing, and the Office of the Ombudsperson was created to facilitate the requests to be removed from the list.[39] While listing is an individualized measure, applied to quite a narrow circle of people, this process illustrates how the anti-terrorism measures, adopted by an international body, can be in violation of human rights provisions, if adopted without proper safeguards.

Another important area of international regulation is financing of terrorist organizations. In 1999, the UNGA adopted the International Convention for the Suppression of the Financing of Terrorism to address this issue. In the Preamble to the Convention, states are reminded of the importance of the existence of international legal framework on the "prevention, repression and elimination" of all forms of terrorism.[40] The Convention establishes rules according to which states should criminalize and penalize providing or collecting funds to sponsor terrorist activities (even

[36] Ibid, *Nada v. Switzerland*, Para. 121
[37] Ibid, Para. 170, 197
[38] Ibid, Para. 212-213, Citing *Kadi*, Para. 299
[39] UN Security Council, *Resolution 1730 (2006) General Issues Relating to Sanctions*, 19 December 2006, S/RES/1730 (2006), Res. 1735 (2006), Res. 1904 (2009)
[40] UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, http://www.un.org/law/cod/finterr.htm, Preamble

in cases when the terrorist act did not occur as the result of such financing), undertake steps to identify and freeze or seize such funds, as well as cooperate with other states on prosecuting or extraditing offenders.[41] It is worth noting that the Convention does not apply to "internal" offences, committed by nationals of the state on its territory, when no other state can claim jurisdiction.[42] There is also a provision that the state should comply with the norms of international law (including human rights law) when dealing with the perpetrators, and should guarantee fair treatment for such people.[43] The necessity of criminalization of terrorist financing has been reaffirmed in UNSC Resolution 1373, adopted after the 9/11 attacks. Thus, the SC decided that states should criminalize the financing of a terrorist organization and/or actions, take steps to freeze assets and economic resources (including property) of persons, who commit, participate in, or facilitate the commission of terrorist acts.[44] The adoption of Resolution 1373 shows, inter alia, that the matter of preventing financing of the terrorist activities is one of the main focuses of the UN in terms of the measures for combatting terrorism. It seems that provisions regarding terrorism financing include some safeguards against inappropriate use of this rules, however, the states still have a possibility to apply such rules restrictively.

1.3 Council of Europe's rules and standards of human rights protection while countering terrorism

In the European context, the main human rights instrument is the ECHR, which, similarly to the ICCPR, has provisions that allow different regimes of limitations and derogations. Generally, freedom of expression and freedom of association can be limited for the purposes of

[41] Ibid Art. 2, 4, 8, 12
[42] Ibid Art. 3
[43] Ibid Art. 17
[44] UN Security Council, *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001), http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf, Para. 1 (a,b,c)

national security, with the requirement that such limitations be prescribed by law and are necessary in a democratic society.[45] The Convention also allows for derogations in times of emergency, and has a provision on prohibition of the rights abuse, similar to Art. 5 (1) of the ICCPR.[46] Apart from this general framework, there are also a number of documents and provisions that regulate anti-terrorism measures, including ones aimed at prevention.

In 1977, the Council of Europe adopted the European Convention on the Suppression of Terrorism, which regulates the matters of assistance between the states and extradition of persons involved in specific offences of terrorist nature (aircraft seizures, taking hostages, attacks against diplomats, etc.).[47] Notably, the Convention did not have any provisions on the compliance with human rights law. In 2003, the Convention was amended with a Protocol, which had some human rights implications, e.g. it contained the provision that states could refuse to extradite offenders, if there is a possibility for them to be exposed to torture.[48]

In 2002, the Committee of Ministers of the Council of Europe adopted the Guidelines on human rights and the fight against terrorism, where it laid down recommendations in regard to observance of human rights provisions when fighting terrorism. For example, it was noted that in the fight against terrorism, "it is not only possible, but also absolutely necessary" for states to respect human rights and rule of law.[49] Moreover, the anti-terrorism measures should be lawful, not arbitrary or discriminatory, and in case they restrict human rights, such restrictions should "be

[45] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended*, 4 November 1950, ETS 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf, Art. 10, 11
[46] Ibid, Art. 15, 17
[47] Council of Europe, *European Convention on the Suppression of Terrorism*, 27 January 1977, ETS 90. https://rm.coe.int/16800771b2
[48] Council of Europe, *Protocol amending the European Convention on the Suppression of Terrorism*, 15 May 2003, ETS 190, https://rm.coe.int/168008370d
[49] Council of Europe: Committee of Ministers, *Guidelines on human rights and the fight against terrorism*, 11 July 2002, https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf, Preamble [d.],

defined as precisely as possible and be necessary and proportionate to the aim pursued".[50] The motivation for the adoption of the Guidelines were the extensive and sometimes "abusive" anti-terrorism measures, adopted by states in reaction to the 9/11 attacks.[51]

It should be mentioned that the Council of Europe adopted an instrument, that is specifically directed at the terrorism prevention, namely - the 2005 Convention on the Prevention of Terrorism. This Convention has required states to criminalize offences, such as "public provocation to commit a terrorist offence", "recruitment" and "training" for terrorism.[52] The Convention provides definitions of these offences, and establishes that states should prosecute not only the individuals, but also legal entities involved in such offences.[53] The definition of "public provocation" is quite broad, as it covers "distribution … of a message to the public, with the intent to incite the commission of a terrorist offence", where this poses a "danger that one or more such offences may be committed".[54] Direct advocacy of a terrorist offence is not a required element of provocation.[55] Notably, the Convention also provides for some safeguards, stipulating that in criminalization of such offences states should respect freedom of religion, freedom of expression and association, as well as adhere to the principle of proportionality, and avoid arbitrariness or discrimination.[56] Moreover, in the Explanatory Report to the Convention the importance of compliance with human rights standards is highlighted, as the conduct required to be criminalized is "on the border between the legitimate exercise of freedoms, such as freedom of expression,

[50] Ibid Art. II, III
[51] Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, 131.
[52] Council of Europe, *Council of Europe Convention on the Prevention of Terrorism*, 16 May 2005, CETS 196, https://rm.coe.int/168008371c, Art. 5, 6, 7
[53] Ibid, Art. 10
[54] Ibid, Art. 5 (1)
[55] Ibid
[56] Ibid, Art. 12

association or religion, and criminal behavior."[57] It can be seen that the Council of Europe in its regulations pays a lot of attention to the issue of respect of human rights while countering terrorism.

The European system also has a separate Convention that regulates, among other issues, the financing of terrorism. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism was adopted in 2005, and in its Preamble it refers to SC Res. 1373 and to the 1999 Convention for the Suppression of the Financing of Terrorism.[58] The Convention contains provisions that states should take measures to identify and freeze/seize assists and property that is used for the financing of terrorism, and should cooperate with other states on this matter. This document echoes the provisions of the UN instruments, and does not contain any mentions of human rights or rule of law, though it does say that states should adopt legislation framework to regulate the processes, such as confiscation, and should adhere to domestic laws and administrative procedures when implementing such measures.[59]

As could be seen from the number of international and European instruments, prevention of terrorism plays an important role in the fight against terrorism. This is understandable, considering the nature and potential consequences of terrorist attacks, that the state and international organizations would adopt all necessary measures to prevent the acts from happening in the first place. However, in the absence of clear definitions and standards, there is a danger that states would use the most restrictive and invasive measures possible. The international bodies

[57] Council of Europe, *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism*, https://rm.coe.int/16800d3811, Para. 29, 30
[58] Council of Europe, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 16 May 2005, CETS 198, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371
[59] Ibid, Art. 24

acknowledge this problem, and constantly remind states that they should comply with human rights provisions when implementing anti-terrorism policies. However, such provisions are usually very general and do not include any concrete measures or sanctions for non-compliance. Moreover, the example of the listing procedures, authorized by the UNSC, shows that international bodies can ignore human rights law in their work. There is a need for further development and consolidation of standards of balancing the security and human rights in counter-terrorism law.

Chapter 2 Anti-terrorism and anti-extremism legislation, regulations and measures in Turkey and Russia

Regulation of terrorism-related issues in a state can have a wide variety of different forms: general provisions in the constitution or basic law (e.g. regarding security), specific legislation, provisions in a Criminal Code or other relevant legislation, regulations adopted by the executive, and others. Overview of the norms on anti-terrorism helps to better understand not only the state policy in this domain, but also the ways that state could misuse such norms, and the court's reaction to potential or real misuse. In this chapter the national regulation of terrorism prevention and relevant issues in Turkey and Russia will be addressed, and its potential impact on the media and journalists, as well as on civil activists and organizations will be analyzed.

2.1 General overview of anti-terrorism regulation, the definition of terrorism/extremism

Turkey has a long history of suffering from terrorism and terrorist acts by several groups, since the 1980s the major group, targeting the state, being the Kurdistan Workers' Party (PKK).[60] Up until the beginning of the 1990s, the general provisions on the terrorism prevention and punishment were included in the Turkish Criminal Code, however such provisions were deemed to be ineffective, and there was a need to enact a special legislation.[61] In 1991 the Law on Fight against Terrorism (Act. no. 3713, hereinafter – the Law 3713) was adopted, and it is still the main piece of legislation regulating terrorism related matters, including the definition of terrorism and terrorist offences.[62] It should be noted that since 1991 this Law has undergone a number of

[60] Zeldin Wendy, *Turkey: Counterterrorism and Justice*, The Law Library of Congress, September 2015, https://www.loc.gov/law/help/counterterrorism/turkey-counterterrorism-justice.pdf, 1

[61] Hikmet Sami Türk, "An Overview of Legal Responses to Terrorism," *Defence Against Terrorism Review* 05, no. 01 (Spring and Fall 2013): 77.

[62] Law on Fight against Terrorism, Act Nr. 3713, as amended in 2010, http://www.legislationline.org/download/action/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf

amendments, the latest one being in 2015.[63]

The Law 3713 provides general framework for fighting and preventing of terrorism, as well as punishment for the terrorist offences. Art. 1 of the Law 3713 contains the definition of terrorism, which is described as follows:

> Any criminal action conducted by one or more persons belonging to an organization with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.

As it could be seen from the definition, terrorism in Turkey is mainly understood as a danger to the state, its structure and its citizens. Such definition presents an interesting setting. On one hand, it is relatively narrow, as Turkey seems to be "focused on confronting internal threats", rather than on combatting international terrorism.[64] On the other hand, it is broad in a sense that it still potentially allows the state to fight the "enemies" from within: for example, actions aimed at changing political or social systems can be broadly interpreted to attack those, who do not support the government and its policies. Such misapplication of anti-terrorism law is not merely a speculation, it is supported by evidence that the law was interpreted broadly to target "political opponents, journalists, and activists".[65]

It is worth noting that the definition of terrorism does not have any explicit mention of violence, as it is just stated that terrorism is "any criminal action" with a specific aim, listed in the law. The Law 3713 also provides a list of offences that are considered as "terrorist", by stipulating

[63] Ipek Demirsu, *Counter-Terrorism and the Prospects of Human Rights: Securitizing Difference and Dissent* (Springer, 2017), 127.
[64] Report "Turkey: Extremism & Counter-Extremism" (Counter Extremism Project, 2018), https://www.counterextremism.com/sites/default/files/country_pdf/TR-01192018.pdf.
[65] "Turkey: Extremism & Counter-Extremism."

in Art. 3 a number of articles of the Turkish Criminal Code, that criminalize such offences.[66] The offences include "disrupting the unity and integrity of the state" (Art. 302), which criminalizes, among other acts, act of separatism (described as a separation a part of territory under the sovereignty of state from its administration).[67] Other offences, such as, for example, attempts to change constitutional order (Art. 309), disrupt the work of the National Assembly (Art. 311) or the Government (Art. 312), include the element of violence.[68] All things considered, the list of terrorist offences in the Criminal Code echoes and further elaborates on the acts, mentioned in Art. 1 of the Law 3713.

Similarly to Turkey, the Russian Federation also has a specific law, regulating the issues of anti-terrorism. The Law on Countering Terrorism was adopted in 2006, and since then has been amended at least 16 times, last time being in 2016.[69] The law provides the definition of terrorism, stipulates main principles that should be applied, when countering terrorism, and contains other important provisions.

The Law on Countering Terrorism defines terrorism as "the ideology of violence and the practice of influencing decision-making of state authorities, local governments or international organizations, related to the intimidation of the population and (or) other forms of unlawful acts of violence".[70] As it could be seen, this definition is more abstract than the definition in Turkish Law 3713, and describes terrorism rather as a broad theoretical concept, instead of listing the underlying reasons and aims of terrorist crimes. The element of violence is included in the notion of terrorism. It is also interesting, that Russian legislation mentions international organizations,

[66] Turkey, the Law 3713, Art. 3
[67] Venice Commission, Penal Code of Turkey, CDL-REF(2016)011, http://www.legislationline.org/download/action/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf
[68] Ibid
[69] In Russian: Российская Федерация, Федеральный Закон "О противодействии терроризму", 1 марта 2006 (Russia, Federal Law "On Countering Terrorism", 1 March 2006), http://docs.cntd.ru/document/901970787
[70] Ibid, Art. 3.1

and acknowledges that they can be targets of terrorism, unlike the Turkish law. Art. 3.2 of the Russian Law stipulates what constitute "terrorist activity"; this includes preparation and carrying out a terrorist act, participating in an organized group with a purpose of carrying out a terrorist act, recruitment of terrorists, financing of terrorist organizations, propaganda of ideas of terrorism, incitement and justification of terrorism, and other.[71] The legislation also has provisions that Russia seeks to cooperate with other states and international organizations in combatting terrorism.[72] Moreover, the Law specifically mentions that promotion and protection of the fundamental rights and freedoms is one of the basic principles of fighting terrorism.[73] It could be said that the Law on Countering Terrorism in Russia is written in broader and more general terms than the Law 3713 in Turkey, and is not as "internal-oriented" as the latter. It reassures that Russia is committed to protect human rights, while combatting terrorism.

While the Russian Law on Countering Terrorism is a special law important for analysis of anti-terrorism measures, there is another interesting and vital piece of legislation, namely – the Law on Combatting Extremist Activity (Anti-extremism Law), which was adopted in 2002, and underwent a number of amendments since then. As it says in the preamble to this Law, it defines main principles and areas of activities, aimed at countering extremism.[74] The Law does not provide a definition of extremism per se, but rather lists the activities that are considered as extremist. It should be noted that the list has been revised and expanded several times since the adoption of the document.[75] The list of extremist activities includes a wide variety of offences of different levels of severity. For example, such offences include violent change of the foundations of the

[71] Ibid, Art. 3.2
[72] Ibid, Art.
[73] Ibid, Art. 2.3
[74] In Russian: Российская Федерация, Федеральный закон "О противодействии экстремистской деятельности" 10 июля 2002 (Russia, Federal Law "On Combatting Extremist Activity", 10 July 2002), http://pravo.gov.ru/proxy/ips/?docbody=&link_id=14&nd=102079221&intelsearch=, Preamble
[75] Ibid, Changes

constitutional system, violation of territorial integrity, incitement of social, racial, national or religious discord, violation of human rights based on social, racial, national, religious or linguistic affiliation, obstruction of activities of governmental bodies, distribution of extremist materials, and other acts.[76] It should be noted that terrorist activities and public justification of terrorism are also included in the list as extremist offences.[77] Establishing terrorism as a separate crime and including it as an extremist offence is quite puzzling, as there is hardly any reason for such "duplication". The Law also contains provision that a person (including citizens of Russia and foreign citizens) can bear criminal and administrative responsibility for extremist activities.[78] However, the Law itself does not establish such responsibility for individuals (though it does for the organizations), therefore a person can be found guilty of only those extremist activities, that are stipulated in a relevant legislation, such as the Criminal Code and the Code of Administrative Offences.[79] It should be said, that the Law on Combatting Extremism covers a lot of different types of activities, including those that could potentially lead to terrorism. Thus, it can be seen as an attempt not only to prevent terrorist activities as such, but also to prevent potential causes of terrorism, such as radicalization, animosity in society, etc., even though it is not explicitly mentioned in the Law. However, vague, and very broad understanding of extremist activities creates possibility for using this law to target groups and individuals in society, who do not necessarily engage in dangerous activities.

2.2 Terrorist organization notion in the legislation

Civil society and religious organizations, as well as media are often being targeted by the

[76] Ibid, Art. 1.1
[77] Ibid
[78] Ibid, Art. 15
[79] Alexander Verkhovsky. Anti-Extremist Legislation, its Use and Misuse, 05 July 2008, http://www.sova-center.ru/en/xenophobia/reports-analyses/2008/07/d13739/

oppressive governments for the criticism of policies, governmental actions, etc. It is important to analyze how anti-terrorism legislation and regulations define terrorist and extremist organizations, and what measures do they impose on such organizations, to be able to better understand whether such measures can be used to target organizations, which are not engaged in unlawful activities.

Turkish Law 3713 does not explicitly provide definition of what is terrorist organization, however it can be found along the lines of the definition of a "terrorist offender". Thus, it is said that "a member of organizations formed to achieve aims" that are included in the definition of terrorism are considered as terrorist offenders.[80] This means that an organization is considered a terrorist organization, if it is created with a purpose to achieve terrorist aims. In Art. 7 of the Law 3713 further provisions regarding terrorist organizations could be found. It is stated, that persons who "establish, lead, or are a member of a terrorist organization in order to commit crimes in furtherance of the [terrorist] aims … through use of force and violence, be means of coercion, intimidation, suppression or threat" should be punished according with the provisions of Turkish Criminal Code on armed organizations.[81] Thus, it is implied that terrorist organizations use force and coercion to achieve its aims, which is in line with a general understanding of functioning of terrorist organizations. However, there are still several problematic areas in the Turkish Law regarding terrorist organizations.

First of all, the Law 3713 provides that persons who spread propaganda for a terrorist organization should be punished by imprisonment (with terms varying from one to five years), moreover, if such propaganda is spread through mass media, the punishment should be increased by one half.[82] The Law also stipulates that periodicals that publish propaganda for a terrorist

[80] Turkey, the Law 3713
[81] Ibid, Art. 7
[82] Ibid

organization can be suspended from 15 days to a month, either by a decision of a judge or, in cases when there is there is a threat of harm, by a decision of a prosecutor.[83] This creates an issue for those media and broadcasting outlets, which are reporting on terrorism, as they potentially can be found guilty as disseminating propaganda, and their publication could be suspended.

Secondly, the Law also establishes punishment for a specific behavior during assemblies, that "has been turned into a propaganda for a terrorist organization".[84] Thus, it is prohibited to conceal faces (fully or partly) during demonstrations and public meetings, that became a propaganda of a terrorist organization. Moreover, the persons who, during such demonstrations, carry the signs of such organization, wear a uniform or shout slogans/making announcement through audio equipment, are presumed to be a member or a follower of the organization and should also be punished, according to the Law.[85] It is not clear from the Law, what does "turning into propaganda" means in regard to demonstration. Therefore, such provisions allow to punish participants of the demonstrations, who were not violent, by the mere fact that the wore a face-concealing gear. The Law also equates carrying signs of the organization and shouting slogans (without explaining the meaning of "signs", "slogans", etc.) with being a member of such organization. Such ambiguities present a danger of punishment of persons, not involved in violence, and can be an unproportionate restriction on the right to assembly.

Speaking about membership of a terrorist organization, the definition of a terrorist offender should be mentioned again. The Law 3713 provides three possible variations of who can be considered as a terrorist offender: members of terrorist organizations, who commit crimes to advance such terrorist aims; members of the organizations, who do not commit crimes, by the mere

[83] Ibid, Art.6
[84] Ibid Art 7
[85] Ibid

fact of membership; and persons, who commit such crimes in the name of organization, without being a formal member of the organization.[86] This means that people are perceived as terrorists either for committing terrorist acts, or for being a member of a terrorist organization. While such definition does not in itself present an issue, it should be noted that in 2016, in the wake of a terrorist attack in the Turkish capital, Ankara, president Erdoğan "demanded" that the definition of a terrorist offender should include also those persons, who "support terrorism".[87] The President suggested that activists, academics, lawmakers, journalists and other categories could be potentially included in the definition of terrorist offenders for their alleged support for terrorism, because such people are "accomplices" to terrorist acts.[88] Even though the Law 3713 was not amended after these demands from the President, such comments are still worrisome. Potential inclusion of such groups of people in the law as terrorist offenders may lead to expansion of the notion of terrorist organization.

Russian Law on Countering Terrorism contains provisions on the terrorist organizations, and prohibits the creation and activities of the organizations, "goals or actions of which are aimed at propaganda, justification and support of terrorism" or committing specific kind of crimes (listed in Art. 24.1).[89] Such crimes include carrying out of the terrorist acts (including the acts of international terrorism), contributing to terrorist activity, public calls for committing of terrorist activities, public justification or propaganda of terrorism, encroachment on the life of a stateman or a public figure, violent seizure of power, and others, and are stipulated in the Criminal Code.[90] The particular interest is presented by Art. 280 of the Criminal Code, which criminalizes public

[86] Turkey, Law 3713, Art. 2
[87] "Turkey: Extremism & Counter-Extremism."
[88] Ibid
[89] Russia, Law on Countering Terrorism, Art. 24
[90] Ibid, Criminal Code

calls to extremist activities (including calls to violation of territorial integrity of Russia), and Art. 282_1-282_3, which criminalize organizing and financing of extremist community or organization.[91] These provisions criminalize extremist activities, however, they are also included in the anti-terrorism legislation, which creates a certain level of confusion as to how to label organizations, involved in such activities. As it was mentioned, the activities of terrorist organizations are prohibited, such organizations should be liquidated and banned by the court, and these rules are also applicable to the foreign and international organizations and their branches, operating on the territory of Russia.[92]

The Law on Combatting Extremism provides additional rules regarding the activities of extremist organizations. It prohibits "formation and activities of civil, religious or other organizations, the goals or actions of which are aimed at carrying out of the extremist activities".[93] If the organization is carrying out extremist activities that violate human rights, harm public order or national security, or present a real threat of such harm, it could be dissolved, and its activities could be banned.[94] The activities of the organization could also be suspended, if there is a pending case for its dissolution before the court's decision on such matter.[95] If the activities are suspended, the members of the organization cannot hold meeting or assemblies and cannot use mass media, so in fact it cannot operate as an organization during such suspension.[96] It is particularly important for religious organizations, as this means that during a suspension, the followers cannot gather for the religious service. The Law also has separate provisions on the responsibility of mass media for distribution of extremist materials and for engaging in extremist activities. Thus, if engaged in

[91] Criminal Code, Art. 280, Art. 282_1-282_3
[92] Law on Countering Terrorism, Art. 24.2 and 24.4
[93] Law on Combatting Extremism, Art. 9 Part 1
[94] Ibid, Art. 9 Part 2
[95] Ibid, Art. 10 Part 1
[96] Ibid, Art. 10, Part 3

such activities, the mass media outlets can be deregistered; the law also allows for suspension of periodicals and audio-/video-programs that contain extremist materials, as well as seizure of undistributed production of mass media with such materials.[97] It could be said that in Russian legislation, both in Law on terrorism and in Law on extremism, the definitions of terrorist and extremist organizations are broad, and can include organizations that do not engage or incite violence.

2.3 Propaganda of and incitement to terrorism/extremism

Terrorism propaganda and incitement to commit terrorist acts are the actions that could be criminalized by the states in order to stop the spreading of ideas of terrorism. However, these notions can also be used to silence any discussions on terrorism, and target lawyers, journalists, and other activists, as well as media outlets, for actions that do not have relations to terrorism.

In Turkish law propaganda of terrorism is mentioned in several settings. As it was mentioned before, in Turkey propaganda for a terrorist organization is prohibited, and the punishment for such propaganda is increased for dissemination of such propaganda through mass media, as well as the publication of such media can be suspended. There are also specific rules established for assemblies, that turned into a propaganda for a terrorist organization. However, the term "propaganda" is not defined or explained in the Law itself. In Turkish Criminal Code there is a provision that establishes punishment for individuals "who make propaganda for an organization in a manner which would legitimize or praise the terror organization's methods including force, violence or threats or in a manner which would incite use of these methods".[98] According to such interpretation, in order for a statement to be considered as propaganda, it should include praising of terrorist methods or incite using of such matters. Incitement is mentioned in

[97] Ibid, Art. 11
[98] Turkish Criminal Code, Art. 220.8

the Law 3713, however, only in a context of rules on mass media. Thus, if a mass media publishes materials that include "public incitement of crimes within the framework of activities of a terrorist organization, praise of committed crimes or of criminals", it could be suspended.[99] Finally, some provisions of the Law 3713 are not directly connected to propaganda, but their essence resemble that of propaganda or incitement. Thus, the Law establishes punishment for printing or publishing declarations or announcements of terrorist organizations, as well as for disclosing or publishing the names of officials involved in fight against terrorism. It should be noted that the provisions on propaganda and publishing of declarations of terrorist organizations have been revised in 2013, so only statements that "praise, legitimize or encourage the employment of methods that involve the use of coercion, violence and threat" are penalized.[100] Despite such changes, and narrowing down the interpretation of terrorist propaganda, the practice of the Law implementation shows that these provisions are still used to target dissenters. For example, a number of journalists and public figures were prosecuted for terrorist propaganda in 2017 for participation in solidarity campaign with pro-Kurdish newspaper.[101] This shows that the notion of terrorist propaganda in Turkey is interpreted extensively, and used for prosecuting persons, who are not necessarily involved in praising or incitement of terrorism.

In Russian Law on Countering Terrorism, propaganda of terrorist ideas, justification of terrorism and incitement to terrorist acts are included in the definition of terrorist activities.[102] There is no further elaboration on the meaning of these notions in the law, which opens possibility for wide interpretation of propaganda and incitement. In the Law on extremism public justification

[99] Turkey, the Law 3713, Art. 6
[100] Demirsu, *Counter-Terrorism and the Prospects of Human Rights*, 120.
[101] Human Rights Watch, World Report 2018, Turkey, https://www.hrw.org/world-report/2018/country-chapters/turkey
[102] Russian Law on Countering Terrorism, Art. 1.2

of terrorism, incitement to commit extremist acts, as well as public calls to such actions and distribution of extremist materials are viewed as an extremist activity.[103] The Law also prohibits "the incitement of social, racial, ethnic or religious hatred", provision that is echoed in Art. 282 of the Criminal Code, which prohibits "incitement of hatred or animosity, and abasement of human dignity based on grounds of gender, race, nationality, language, origin, attitude to religion, as well as belonging to a social group".[104] These provisions are of a particular interest, as Art. 282 is tend to be used to prosecute journalists and activists for criticizing governmental officials, or governmental actions (including governmental response to terrorism).[105] Another important provision that should be mentioned is the notion of extremist materials, which are defined as "documents intended for publication or information on other media calling for extremist activity to be carried out or substantiating or justifying the necessity of carrying out such activity, publications substantiating or justifying ethnic and/or racial superiority or justifying the practice of committing war crimes or other crimes aimed at the full or partial destruction of any ethnic, social, racial, national or religious group" and are prohibited for distribution.[106] Such definition is broad, and there are no comprehensible criteria as to how the documents may be found extremist. This was criticized by the Venice Commission in its opinion on the Law on extremism, as it was noted that such vagueness and lack of standards "has potential to open the way to arbitrariness and abuse".[107] All in all, the propaganda of terrorism and extremist activities and incitement to such actions are not defined with necessary precision in the legislation, which allows for mis-use of the provisions to target dissenting groups and individuals.

[103] Russian Law on Combatting Extremism, Art. 1
[104] Russian Law on Combatting Extremism, Art. 1, Russian Criminal Code, Art. 282
[105] See, e.g. Maria Kravchenko, Inappropriate Enforcement of Anti-Extremist Legislation in Russia in 2016, http://www.sova-center.ru/en/misuse/reports-analyses/2017/04/d36857/
[106] Russian Law on Combatting Extremism, Art. 1.3
[107] Venice Commission, *Opinion On the Federal Law On Combatting Extremist Activity*, CDL-AD(2012)016, 20 June 2012, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)016-e

2.4 Anti-terrorism and anti-extremism in Russia and Turkey: implementation and further remarks

Loose definitions in the law related to terrorism and extremism in Turkey and Russia, as well as their broad interpretation, allow the states to "repurpose" such laws to target not only those, at whom such laws are aimed, namely – terrorists and their active supporters, but also those who are not involved in prohibited activities, merely for criticism and expressing dissenting views. There are numerous examples of such misuse in both Turkey and Russia, targeting different groups and individuals.

One of the groups that is targeted by such legislation, is the press. For example, in the Russia such legislation is constantly used to prosecute journalists, who write about Northern Caucasus, including the cases when the journalists cite or reprint statements from leaders of separatist movements, that do not include any element of incitement to violence.[108] Anti-extremism legislation is also used to punish people, who are not journalists, for publishing information and opinions online. Such application of this law became even more frequent after the outbreak of conflict with Ukrainein 2014. Thus, persons, who post videos and statements online, criticizing involvement of Russia in this conflict, are being prosecuted for extremist activities and heavily penalized (prison terms).[109]

Turkey is also using its anti-terrorism law to prosecute journalists. One of the most striking examples were numerous trials of journalists on terrorism-related charges in connection with a coup in 2016.[110] Journalists are being accused of connection with terrorist organizations,

[108] "*Russia's Supreme Court upholds 7-year sentence for journalist for inciting terrorism*", Russian Legal Information Agency, 23 July 2015, http://www.rapsinews.com/judicial_news/20150723/274250392.html, Supra *Dmitriyevskiy v. Russia*

[109] Freedom House, Report: Freedom of the Press 2016, Russia, https://freedomhouse.org/report/freedom-press/2016/russia

[110] Mihul Srivastava, *"Turkey journalists in court on terrorism-related charges"*, The Financial Times, 24 July 2017, https://www.ft.com/content/528f50f2-705e-11e7-93ff-99f383b09ff9

involvement in the coup attempt, and terrorist propaganda, even though there is no evidence that their materials contained incitement to violence.[111] Apart from targeting individual journalist, there is also a practice of suspending and shutting down of the media outlets, especially in the light of the coup attempt, however such practice has been used long before the coup.[112]

It should be noted that anti-terrorism legislation allows states to prosecute not only the most "obvious" groups, such as journalists, or civil society leaders, but any groups and persons critical of the government. The most notorious recent example of this is, probably, the crack down on university professors and academics in Turkey. Thus, in 2016, more than a thousand academics (both from Turkey and abroad) signed a petition to the Turkish government, calling for a peaceful resolution of the Kurdish conflict, after which a considerable number of Turkish professors were detained and charged under anti-terrorism laws.[113] Moreover, after the failed coup in summer 2016, large number of academics were banned from working at universities, as well as arrested and prosecuted.[114]

In Russia, anti-extremism legislation has been successfully used to persecute religious groups. One of the recent example is the ban of Jehovah's Witnesses, and labeling this religious organization as extremist in 2017.[115] After the ban, members of the organization can be criminally liable not only for proselytizing, but even for gathering together in private.[116] The experts note that

[111] HRW World Report 2018, Turkey
[112] Constanze Letsch, *"Turkey shuts 15 media outlets and arrests opposition editor"*, The Guardian https://www.theguardian.com/world/2016/oct/30/turkey-shuts-media-outlets-terrorist-links-civil-servants-press-freedom, Supra, e.g. *Ürper and Others v. Turkey*
[113] Bahar Baser, Samim Akgönül and Ahmet Erdi Öztürk, *'"Academics for Peace" in Turkey: A Case of Criminalising Dissent and Critical Thought via Counterterrorism Policy'* (2017) 10 Critical Studies on Terrorism 274-296, pp.285-287.
[114] Ibid, pp. 290-291, HRW World Report 2018, Turkey
[115] Alec Luhn, "*Russia bans Jehovah's Witnesses as 'extremist*'", The Telegraph, 17 August 2017, http://www.telegraph.co.uk/news/2017/08/17/russia-bans-jehovahs-witnesses-extremist/
[116] Ibid

the possible reason for this ban is the concern of the Russian government that Jehovah's Witnesses act as "an agent of Western influence".[117]

The mentioned examples show the effect that the laws on terrorism and extremism can have on civil society and religious groups, journalists and activists, critical of the government. It should be noted that the laws of both countries and their implementations have been heavily criticized by the international organizations and institutions. Thus, in the Report on Turkey (European Commission Staff Working Document), it was stated that Turkish anti-terrorism law, as well as its implementation in not in line with the European law, including the case-law of the ECtHR, as well as noticed that this has a serious strain on the freedom of expression.[118] Russian anti-extremism law has been criticized, among others, by the UN CEDR, which called on drafting of a clear legal definition of extremism to avoid silencing of vulnerable groups.[119]

National courts have been trying to provide clear standards in implementation of such laws. For example, the Russian Supreme Court has issued a Resolution "Concerning Judicial Practice in Criminal Cases Regarding Crimes of Extremism", which cleared some definitions and provided guidance for the courts on the implementation of the law. [120] For example, it stated that criticism of politicians and officials should not be interpreted as incitement to hatred and violence, as the limit of criticism is broader for such groups of persons, citing for this, inter alia, the case-law of

[117] Ibid

[118] Commission Staff Working Document, Turkey 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy, SWD(2016), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0366&from=EN

[119] Amnesty International, Report, Russian Federation 2017/2018, https://www.amnesty.org/en/countries/europe-and-central-asia/russian-federation/report-russian-federation/

[120] In Russian: Постановление Пленума Верховного Суда Российской Федерации от 28 июня 2011 г. N 11 г. Москва "О судебной практике по уголовным делам о преступлениях экстремистской направленности" (Resolution No. 11 of the plenary meeting of the Supreme Court of the Russian Federation Concerning Judicial Practice in Criminal Cases Regarding Crimes of Extremism, 28 June 2011), https://rg.ru/2011/07/04/vs-dok.html

the ECtHR.[121] It has also noted that criticism of political and religious organizations or views should not be interpreted as incitement of hatred or animosity.[122] At the same time, the Supreme Court has failed to provide important clarifications on what are the protected groups under the notion of social group, as well as define more precisely provisions on organization of extremist groups.[123] It is important that the Supreme Court clarify the standards of the application of the anti-extremism law, and used the standards of the ECtHR for this, however, the law is still vague, and the recent examples, mentioned before, show creates an opportunity for its misuse .

In Turkey, the Constitutional Court has reviewed the compatibility of several provisions of the Law 3713 with the Constitution. For example, it reviewed Art. 6(5) of the Law 3713 that allows preventive suspension of the publication of mass media for propaganda of terrorist organizations, in particular, the claim (lodged by a former Turkish president) that such provision creates an unconstitutional penalty.[124] In its decision the Constitutional Court has explained that in order for the measure of suspension to be applied, the offence should be committed not only through media, but also within a framework of a terrorist organization. It highlighted that such measure has "the aim of preventing the deliberate use of the press and the media in terrorist activities and ensuring that the press and media organs act with responsibility", and reiterated that the necessity for adoption of such measure lies within the obligation of the legislature to protect the state and citizens from terrorism.[125] While the logic of this decision is understandable, the practice of the use of suspensions on the mass media outlets shows that Turkey goes beyond the meaning,

[121] Ibid, Para. 7
[122] Ibid
[123] Inappropriate enforcement of anti-extremist legislation in Russia in 2011, http://www.sova-center.ru/en/misuse/reports-analyses/2012/04/d24302/
[124] Turgay and Others v. Turkey, Judgement from 15 June 2010, Applications nos. 8306/08, 8340/08 and 8366/08), http://hudoc.echr.coe.int/eng?i=001-99393, Para. 13
[125] Ibid.

explained by the Constitutional Court, and uses it not only to prevent terrorist propaganda, but to punish criticism.

It should be said that the legislation on terrorism and extremism in Turkey and in Russia have their peculiarities, however, there are also some resemblance. First of all, in Turkey there is only one "regime" of prevention – prevention of terrorism, which is stipulated in the Law 3713. The notion of terrorism is defined in this Law, and in its essence is quite "internally-oriented", meaning that it prohibits acts that are specific for Turkish context, without any mention of the international terrorism. In Russia, in turn, there are two separate, but interconnected, regimes – anti-terrorism and anti-extremism. Anti-terrorism Law defines terrorism and terrorist acts quite broadly, and in line with the provisions of the UN and the Council of Europe documents. Anti-extremism law, in turn, define extremism as a list of potential extremist activities, and terrorism is included as one of such acts, which places it in the same category with crimes, that do not have the same destructive force (such as humiliation of national dignity, for example). Both in Turkey and in Russia the establishment of terrorist (an in context of Russia – also extremist) organizations are prohibited. Incitement and propaganda of terrorism are prohibited in both countries, however, Russia has additional provisions that the incitement of hatred and animosity based on race, ethnic origin, membership of a social group, etc. is considered as an extremist activity. To conclude, it should be said that Turkish Law 3713 interprets terrorism rather as a domestic act, which allows the state to use it to target those, who are seen as "internal enemies". Terrorism prevention is viewed in the light of the fight with internal "enemy" groups, and allows to prosecute those, who agree with the policy towards such groups. Russian law on terrorism, in turn, is quite broad and includes a wide variety of criminalized offences. However, from practice it seems that Russia focuses more on "preventive prevention" of terrorism with its anti-extremism law, targeting not

even potential terrorists, but those, who express any kind of dissent and criticism. The practice of the implementation of these laws provide an example, how they are being constantly misused both by Russia and Turkey to silence opposing voices.

Chapter 3 Anti-terrorism and freedoms: practice under Art. 10 and Art. 11 of the ECtHR through the cases of Russia and Turkey

There are a number of measures how states may employ anti-terrorism to shut down dissent and prosecute opposing voices. Such measures can include arrests, prolonged detentions, seizure and destruction of publications of media outlets, ban of civil and religious organizations, and others. Consequently, these measures can encroach, sometimes disproportionately, on a number of rights and freedoms, protected by the ECHR: right to liberty and security (Art. 5), right to fair trial (Art. 6), right to property (Art. 1 Pr. 1), right to private life (Art. 8), and freedom of expression (Art. 10) and assembly (Art. 11). While it is important to acknowledge different aspects of using such measures, it is equally important to realize that the ultimate aim of such mis-use by the states is to silence opposing views, and strip opponents of their rights to express opinions, to voice them through different channels, including protests, and to form associations.

The European Court of Human Rights has an extensive case-law on the issue of anti-terrorism measures, and reviews cases of such measures infringing on human rights, including freedom of expression and freedom of assembly. As both freedom of assembly and freedom of religion are qualified rights, they can be limited for a number of reasons, and states are usually invoking national security and public safety reasons to justify the interference. While analyzing the case law on anti-terrorism and anti-extremism law and measures from Turkey and Russia, it is interesting to observe not only whether the Court finds violation of the conventional right, but also if it recognizes that such laws are mis-used by these states to prosecute opposition, media and activists.

3.1 Anti-terrorism and media: silencing journalists in Turkey

A lot of case-law on Art. 10 considers issues with mass media, prosecution of journalists

for specific publications, suspension and deregistration of media outlets, etc. Thus, in case of *Saygili and Falakaoğlu v. Turkey* (2008) the applicants, one of whom was an owner and other one an editor of a newspaper, claimed that their rights under Art. 10 were violated by Turkey.[126] The applicants were prosecuted for publishing an article about forced disappearances in south-east Turkey in their newspaper, in which they cited a statement of a politician, who mentioned by name one of the heads of the local gendarmerie. They were prosecuted under the provision of the Law 3713 that prohibits disclosing names of officials involved in the fight against terrorism, by this rendering such persons to be targets of terrorist attacks, and were ordered to pay "a heavy fine"; additionally the newspaper was closed down for three days.[127] The applicants claimed that the published article contained information on a matter of public interest, and therefore publication of such information was protected by freedom of expression.[128] Turkey, in turn, claimed that the interference with the applicants' freedom of expression was justified under Art. 11.2, because the manner in which the article in question was written and its content "was likely to provoke violence and hate crimes in the region".[129] As there were no dispute on the fact of interference to the applicants' rights, and that such interference was "prescribed by law" and "pursued the legitimate aim" (prevention of crime), the Court has gone into the analysis whether the interference was "necessary in democratic society".

In its analysis of the case, the Court underlined that it was taking into account the problems that arise from terrorism and fight against it.[130] Reiterating the general standards of application of Art. 10 towards media, the ECtHR highlighted the important role that press plays in a society,

[126] Saygılı and Falakaoğlu v. Turkey, Judgement from 21 October 2008, Application no. 39457/03 http://hudoc.echr.coe.int/eng?i=001-89110
[127] Ibid, Para. 8, 10
[128] Ibid, Para. 11
[129] Ibid, Para. 17
[130] Ibid, Para. 19, 21

saying that even though there are some bounds that the media should not overstep (e.g. for protection of reputation, or to prevent crimes), generally it should be able to freely disseminate information on matters of public interest, even if it includes a "degree of exaggeration, or even provocation".[131] Moreover, the Court said that the press plays an important role of "public watchdog", and being able to report news based on the statements of other people is the vital instrument necessary to maintain such role.[132] Therefore, journalists should not be punished for publishing statements of other people unless there are "particularly strong reasons" for this.[133] Applying the standards on the present case, the Court noticed, that the published statements were made by a politician and concerned forced disappearances, which is the matter of public interest.[134] If such statements were untrue, that could potentially open the possibility for defamation charges, however, the applicants were charged under the Law 3713.[135] Regarding mentioning of one of the officers by name, the Court said that the national courts failed to weight the interest of protecting the identity of the officer (who was already well known in the community) with disclosing such information for the reason of public interest.[136] The Court also noted that read as a whole, the article could not be seen "as incitement to violence against a public official" and did not expose the officer "to significant risk of physical violence".[137] Therefore, the interference with the applicants' freedom of expression was not necessary in democratic society, consequently, the Court found a violation of Art. 10.[138] As it could be seen from the Court's analysis, it did not criticize the provision of the Law 3713 regarding the requirement not to disclose the identities of

[131] Ibid, Para. 22
[132] Ibid, Para. 23
[133] Ibid
[134] Ibid, Para. 25
[135] Ibid
[136] Ibid, Para. 26
[137] Ibid
[138] Ibid, Para. 27, 28

public officials involved in fight against terrorism, but rather analyzed how this rule was applied in the case.

In a similar case, *Demirel and Ateş v. Turkey (No2)*, the Court also reviewed the claim of violation of Art. 10 arising from the application of the Law 3713, however, from a different perspective. The applicants were respectively the chief-editor and the owner of a newspaper, in which an interview with one of the leaders of the PKK was published.[139] In the interview, this person was criticizing Turkey for its policy on Kurdish issue, as well as for imposing the death penalty sentence on the leader of Kurdish movement, Abdullah Öcalan.[140] After the interview was published, the applicants were charged, under Art. 6 (Para. 2 and 4) of the Law 3713, for publishing declarations of the terrorist organizations in media, were fined, and their newspaper was closed for a period of fifteen days.[141] The applicants alleged that this decision of the national court infringed upon their freedom of expression, the Turkish state, in turn, claimed that the interference with the conventional right under Art. 10 was justified for the reasons of protection of territorial integrity and public order.[142] In assessing if the interference was "necessary in a democratic society", the Court noted that the opinions, expressed in the published interview, were considered as a "separatist propaganda of a terrorist organization" by the national court, when, in fact, they consisted of "a critical assessment of Turkey's policies concerning the Kurdish problem".[143] The ECtHR also said that when viewed as a whole, the published material did not "encourage violence, armed resistance, or insurrection" and did not "constitute hate speech", which is an important for assessing the necessity of a measure.[144] Therefore, the Court found a violation of Art. 10, as the

[139] Demirel and Ateş v. Turkey (no2), Judgement from 29 November 2007, Application no. 31080/02, http://hudoc.echr.coe.int/eng?i=001-83632, Para. 4, 5
[140] Ibid, Para. 5
[141] Ibid, Para.6, 7
[142] Ibid, Para. 22
[143] Ibid, Para. 25
[144] Ibid

applicants' conviction was "disproportionate to the aims pursued" and "not necessary in a democratic society".

The use of anti-terrorism legislation to censor and suspend the publication of mass media outlets was addressed in *Ürper and Others v. Turkey* (2010). The applicants were working on different levels (from journalists to owners) in four newspapers, which during 2006-2007 were regularly suspended for periods from fifteen days to a month by national judges, pursuant to Art. 6(5) of the Law 3713.[145] The suspension of the publication was often for the reasons, that the articles and reports in the newspapers contained propaganda in favor of terrorist organizations, approval of the crimes committed by such organizations and their members, and included information identifying officials "who risked terrorist attacks".[146] Moreover, in case of one newspaper, its publication and distribution were suspended for fifteen days on 16 July 2006 not by virtue of provisions of Art. 6(5) of the Law 3713, but based on the fact that its owners, journalists and content were the same, as of another newspaper, which was previously suspended on 12 July 2006.[147] The applicants has also been prosecuted for disseminating propaganda, approving crimes of terrorism and identifying officials as targets for terrorist organizations.[148] It should be noted that in 2006 the former president of Turkey has challenged Art. 6(5) of the Law 3713 before the Constitutional Court, claiming, inter alia, that this provision created unconstitutional punishment, however in 2009 the Constitutional Court dismissed the case.[149] In their claim the applicants alleged violation of their rights under Art. 10 for suspension of

[145] Ürper and Others v. Turkey, Judgment from 20 October 2009, Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, http://hudoc.echr.coe.int/eng?i=001-95201, Para. 5

[146] Ibid, Para. 5, 6

[147] Ibid, Para. 7

[148] Ibid, Para. 9

[149] Ibid, Para. 13

publication and distribution of the four newspapers.[150]

In its analysis, the ECtHR stated that suspension of publication of the newspapers constituted interference with freedom of expression under Art. 10, and then addressed the issue whether such actions against the newspapers were "prescribed by law".[151] The Court reiterated that the requirement of the interference to be prescribed by law includes both the existence of the relevant provisions in domestic law, and the quality of the law (that should be accessible, the consequences foreseeable and the legislation should be compatible with a rule of law).[152] The Court stated that while it had "serious doubts" whether the decision of 16 July 2006 to suspend distribution of a newspaper based on a previous suspension of another newspaper, has ground in domestic law (as such measures are not prescribed by the Law 3713), however it said that there is no need to reach a conclusion on the issue of lawfulness.[153] The Court accepted that Turkey could have pursued a legitimate aim of "preventing disorder and crime" to justify interference, and then analyzed the necessity of such measure in a democratic society.[154] It has noted that because freedom of expression constitute "one of the essential foundations of the democratic society", all limitations on it should be "narrowly interpreted" and the necessity for such limitations "convincingly established".[155] Even though this is primarily the task of the national authorities to assess if there is "a pressing social need" to curtail freedom of expression, and they enjoy a certain margin of appreciation, such margin of appreciation is quite narrow, because of the importance of maintaining of the free press in a democratic society, and the interest of public to receive information from press.[156] The ECtHR said that the Convention does not prohibit prior restraint

[150] Ibid, Para. 23
[151] Ibid, Para. 24
[152] Ibid, Para. 28
[153] Ibid, Para. 29
[154] Ibid, Para. 32
[155] Ibid, Para. 35
[156] Ibid, Para. 35, 36

on publications as such, however, such measures call for "the most careful scrutiny" from the Court.[157] The Turkish judges were imposing prior restraint not only on specific types of articles, but rather were suspending future publications of the entire newspapers, the content of which was unknown.[158] The ECtHR underlined that the content of Art. 6(5) of the Law 3713, and the decisions of national judges were based on the assumption that the applicants would be committing the same offence in future.[159] Therefore, the Court found that the "preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities".[160] It also noted that "less draconian measures" could have been used, such as restriction to publish specific kind of articles or confiscation of some issues of the newspapers.[161] As the result, the Court said that the state has "largely overstepped" the afforded margin of appreciation, and "unjustifiably restricted the essential role of the press as a public watchdog in democratic society".[162] Suspension and banning of future publication of the entire newspaper could not be "necessary in a democratic society" and amounted to censorship, therefore the Court found a violation of Art. 10.

3.2 *Dmitriyevskiy v. Russia*: the first "anti-extremism" case against Russia

An interesting case on prosecution for publishing of statements, critical of the government, is *Dmitriyevskiy v. Russia* (2017). The applicant was a director of an NGO, which monitored the violations of human rights in Chechen Republic and the North Caucasus, as well as the chief editor of a regional newspaper.[163] In 2004, the applicant has reprinted two articles from a website

[157] Ibid, Para. 39
[158] Ibid, Para. 42
[159] Ibid., Para. 43
[160] Ibid
[161] Ibid
[162] Ibid, Para. 44
[163] Dmitriyevskiy v. Russia, Judgement from 3 October 2017, Application no. 42168/06, http://hudoc.echr.coe.int/eng?i=001-177214, Para. 6

Chechenpress (a website of a Chechen separatist movement information agency). The first article contained the address from a Vice-minister of the Government of the Chechen Republic of Ichkeria (unrecognized secessionist government of the Chechen Republic), criticizing the president of Russia, and suggesting voting him out of office; the end contained a note from editorial team, saying that the article was supposed to be published before the presidential elections, and expressing regret on the results of the elections (the same president was re-elected), but stating that the information from the published address is still relevant.[164] The second article contained the address of the President of Ichkeria to the European Parliament, criticizing "Russian terror", claiming that the genocide of the Chechen people is still taking place, and saying that Russian government ("Kremlin") is involved in terrorism.[165] After the publication of these articles, the criminal proceedings under Art. 280.2 (public appeals to extremist activity through the mass media) were opened, however, as there were no identifiable authors of the articles, the investigation was suspended.[166] Following a report from the linguistic expert, who stated that the text did not contain appeals to extremist activity, but rather "aimed at inciting racial, ethnic and social discord, associated with violence", the applicant was charged under Art. 282.2 of the Criminal Code with "incitement to hatred or enmity and the humiliation of human dignity of a group of persons on the grounds of race, ethnic origin, membership of a social group, committed through the mass media".[167] In his case before the European Court, the applicant alleged violation of his rights under Art. 10 of the Convention. He claimed that interference with his freedom of expression was not "prescribed by law", stating that "his conviction had been the result of an

[164] Ibid, Para. 7, 8
[165] Ibid, Para. 9
[166] Ibid, Para. 15
[167] Ibid, Para. 21, 33

unforeseeable, if not abusive, application of Article 282".[168] The government claimed that the interference to the applicant's freedom was lawful, necessary in democratic society, as it pursued the legitimate aims of "protecting the rights and interests of the multinational population of Russia, maintaining public order and preventing possible unlawful actions which the publication of the impugned articles might have provoked".[169]

In its analysis in *Dmitriyevskiy*, the Court has first addressed a question whether the interference with the applicant's freedom of expression was "prescribed by law", as the existence of interference was not contested by the parties.[170] Regarding this issue, the Court noted that the expression "prescribed by law" refers not only to existence of the measure in the domestic law, but also to the "quality of the law in question", saying that such law should be "accessible", its effects should be "foreseeable" and it should be "formulated with sufficient precision to enable the persons concerned … to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct".[171] At the same time, the Court underlined that in the sphere of applicability of the law in this case, it may be difficult to "to frame laws with absolute precision" and "a certain degree of flexibility may be called" to give opportunity to the Russian courts to interpret such provisions.[172] The ECtHR recognized that Russian courts were dealing with "a relatively novel legal issue", therefore it presumed that the interference was prescribed by law.[173] As to the legitimate aim, the Court accepted that the measures against the applicant pursued "the aims of protecting national security, territorial integrity and public safety and preventing disorder and crime".[174] It said that the fight against

[168] Ibid, Para. 58-60
[169] Ibid, Para. 69, 71
[170] Ibid, Para. 76
[171] Ibid, Para. 78
[172] Ibid, Para. 80
[173] Ibid, Para. 82, 83
[174] Ibid, Para. 88

terrorism in general is a sensitive issue, and that the authorities need to "stay alert to acts capable of fueling additional violence", so in a present case it recognized that the sensitive nature of the situation in Chechen Republic required a certain level of vigilance from the authorities.[175]

In assessing the necessity of the measures, applied to the applicant, the Court first laid down the general principles it applied in the areas of freedom of expression, political speech and hate speech. Thus, the Court highlighted the importance of freedom of expression as "one of the essential foundations of a democratic society and one of the basic conditions for its progress", and reiterated that even offensive, shocking and disturbing ideas are protected.[176] It has also highlighted the importance of the press, that has a duty to provide information and report of the issues of public interest, and the public, in turn, has a right to receive such information.[177] The Court underlined, that even though a certain margin of appreciation is afforded to the states in determining the limits of freedom of expression, such margin of appreciation "is coupled with supervision by the Court both of the law and the decisions applying the law and, particularly where the press is concerned, it is circumscribed by the interests of a democratic society in ensuring and maintaining journalistic freedom".[178] Regarding political speech, the Court reminded that there is little scope for restriction of political speech, and the states should provide "very strong reasons" to justify such restrictions, though the states still could adopt measures (including criminal ones) to be able to react to "unjustified attacks and criticisms of its adversaries" in pursue of public order and security.[179] On the matter of hate speech and calls to violence, the Court said that the expression that is alleged to stir violence, should be assessed against a number of factors, including

[175] Ibid, Para. 86, 87
[176] Ibid, Para. 90
[177] Ibid, Para. 91
[178] Ibid, Para. 92
[179] Ibid, Para. 95, 96

social and political background, and if such statements can be seen "as a direct or indirect call to violence or as a justification of violence, hatred or intolerance".[180] The Court said that the statements can be interpreted as containing incitement to violence when they express views that "advocate recourse to violent action or bloody revenge, justify the commission of terrorist offences in pursuit of their supporter's goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons".[181] It also said that the manner in which the statements are made, and their capacity to lead to harmful consequences are important, and in deciding cases on such matters the Court uses "highly context-specific approach".[182]

In applying these standards to the case, the Court noted that the articles, published by the applicant, discussed a matter of public concern (governmental policies in Caucasus region), and were part of the political debate.[183] The Court highlighted that it recognized that difficult situation in Chechen Republic, and that the statements in the articles were made by the persons, who were outlawed in Russia, however it stated that this fact did not justify interference with freedom of expression of a person, who published these statements.[184] Analyzing the published articles, the Court noted that one of them was critical of the government, but still written in quite neutral tone, while the other one contained more "virulent, strongly worded statements".[185] However, such statements did not contain call for violence or incitement of hatred, but were within the limits of permitted political speech, which can often be "controversial" and "virulent".[186] The EctHR noted that the national courts in their decision failed to analyze the content of published articles and

[180] Ibid, Para. 97-99
[181] Ibid, Para. 100
[182] Ibid, Para. 101
[183] Ibid, Para. 103
[184] Ibid, Para. 104
[185] Ibid, Para. 105, 106
[186] Ibid, Para. 106, 109

based their verdict on the analysis of a linguistic expert, which is unacceptable, as only the courts should interpret and decide on legal matters.[187] Moreover, the national courts did not provide any analysis as to the how the published statements can be detrimental to public safety, national security or territorial integrity, and in fact explicitly acknowledged that the applicant's actions did not have any "serious consequences".[188] Even though the applicant's sentence was suspended, the Court noted that the mere fact of the criminal conviction could have "a chilling effect on the exercise of journalistic freedom of expression in Russia and dissuading the press from openly discussing matters of public concern, in particular, those relating to the conflict in the Chechen Republic".[189] Because of these reasons, the Court has found that the applicant's conviction was disproportionate to the aims, invoked by the state, and did not meet "a pressing social need", therefore the applicant's rights under Art. 10 were violated.[190]

3.4 Protesters as terrorists: case of Turkey

The issue of the interreference with the freedom of assembly was analyzed in *Gülcü v. Turkey* (2016). The applicant, a minor at the time, was convicted under terrorism-related charges for participating in a demonstration in protest of prison conditions of the PKK leader and throwing stones at the police officers.[191] The said demonstration took place on July 2018, and was a peaceful protest, however at some point the protestors started throwing stones at police officers and their cars, they were also chanting slogans in support of Abdullah Öcalan and other PKK leaders, carried photos of Öcalan, and did not obey the police request to disperse, after which the police used force to break up the crowd.[192] As there were photos and video footage of the applicant throwing stones

[187] Ibid, Para. 113
[188] Ibid, Para. 110, 114
[189] Ibid, Para. 117
[190] Ibid, Para. 118, 119
[191] Gülcü v. Turkey, Judgment from 19 January 2016, Application no. 17526/10, http://hudoc.echr.coe.int/eng?i=001-160215, Para. 5, 11, 22
[192] Ibid, Para. 9

in the police officers and chanting slogans, he was convicted under the Criminal Law and the Law 3713 of membership of an illegal organization (as he participated in a demonstration that turned into propaganda of an illegal organization), as well as of disseminating propaganda in support of a terrorist organization, and resistance to security forces; he was sentenced to a total of seven years and six month of imprisonment.[193] After the applicant's conviction, a new law came into force, and the proceedings against the applicant were re-opened, as the result he was acquitted of the charge of a terrorism organization by the juvenile court, but convicted of disseminating of propaganda of a terrorist organization (under Art. 7(2) of the Law 3713), as well as of participation in demonstration with prohibited materials, and resistance to security forces and obstruction of their work.[194] It should be noted that the materials of the cases contained the reports from the Commissioner for Human Rights of the Council of Europe, in which he expressed concerns about the provisions in Turkish legislation, that persons who commit an offence on behalf of a terrorist organization, should be sentenced as a member of such organization, even if they do not have this membership; and the extensive use of this provisions to prosecute participants of Kurdish-related demonstrations.[195] He also found worrisome the broad interpretation and application of the Law 3713, especially the definitions of the offences, and noted that "restrictions of human rights in the fight against terrorism 'must be defined as precisely as possible and be necessary and proportionate to the aim pursued'".[196]

The applicant claimed that is conviction for participation in the demonstration and disproportionate sentences constituted violation of his rights under Art. 10, however the Court

[193] Ibid, Para. 21-24
[194] Ibid, Para. 27, 36-40
[195] Ibid, Para. 66
[196] Ibid, Para. 68

chose to examine the complaint under Art. 11 as *lex specialis* in relation to Art. 10.[197] In regard to the existence of interference with the applicant's rights under Art. 11, the Court noted that, in general, interference with freedom of peaceful assembly should not constitute a ban (whether *de jure* or *de facto*), but could also take other forms, such as measures before or during an act of assembly, and punitive measures for the participation after the assembly.[198] The Court showed that, based on its previous case law, the assemblies during which demonstrators were engaged in violence, were still within the scope of Art. 11, however the interference to such demonstrations were justified under Art. 11.2; in the present case there was nothing to indicate that either organizers of demonstration, or the applicant had violent intentions, therefore he enjoyed the protection of Art. 11.[199] Accordingly, the applicant's criminal conviction and detention constituted interference with his right to freedom of assembly.[200] As to question whether the interference was prescribed by law, the Court noted that not only the existence of the basis for a measure in the national law is important, but also the quality of such law.[201] However, the Court chose not to reach a final conclusion of the lawfulness of the applicant's conviction under national law, and not to analyze the quality and foreseeability of the national law (neither the Criminal Code provisions, not the provisions of the Law 3713).[202]

The EctHR accepted the legitimate aims of preventing disorder and crime, and protection of the rights of others, submitted by the Turkish authorities.[203] In the analysis of necessity of interference, the EctHR has highlighted the importance of freedom of assembly for a democratic society, and said that any restrictions on this right should be "narrowly interpreted" and the

[197] Ibid, Para. 73, 75
[198] Ibid, Para. 91
[199] Ibid, Para. 93, 97
[200] Ibid, Para.102
[201] Ibid, Para. 103
[202] Ibid, Para. 108
[203] Ibid, Para. 109

necessity for such restrictions "convincingly established"; in cases under Art. 11, therefore, the Court examines whether the national court applied relevant standards (even though, it affords a certain margin of appreciation to the states), and could also look into the severity of penalties imposed.[204] In applying the standards to a current case, the EctHR noted that the national courts based their decision on the idea that the applicant participated in the demonstration because of the calls from the PKK, however failed to provide evidence or reasons for such conclusions.[205] It expressed concern about the existence of such possibility to convict "a person for membership of an illegal organization for an act or statement which may be deemed to coincide with the aims or instructions of an illegal organization".[206] The national courts also provide no reasons for the applicant's convictions of disseminating propaganda in support of a terrorist organization.[207] The EctHR observed that domestic courts have obligations to provide "relevant" and "sufficient" reasons for their decision, both as part of a right to fair trial under Art. 6(1), but also as an important procedural safeguard under Art. 10 and 11.[208] The Court also addressed the issue of proportionality, and stated that the penalty imposed on the applicant was too harsh, because he was a minor at the time of the conviction, and imprisonment should have been a measure of the last resort.[209] As the result of the analysis, the Court found that Turkey violated the applicant's rights under Art. 11.

3.5 Pending cases from Russia as a road to clearer standards

There are a number of cases from Russia, currently pending before the EctHR, that should be mentioned. One of the groups of the cases include those regarding prosecution of religious

[204] Ibid, Para. 111
[205] Ibid, Para. 112
[206] Ibid
[207] Ibid., Para. 113
[208] Ibid, Para. 114
[209] Ibid, Para. 116

groups based on the provisions of the Law on Combatting Extremism. A substantial part of such cases concerns the restriction on the activities and liquidation of the organizations of Jehovah's Witnesses. For example, in *SAMARA LRO and others against Russia* (2015), the applicants were a local Jehovah's Witnesses organization (Samara LRO) and six individual members. The regional court in Russia has banned some of the literature of Jehovah's Witnesses as extremist; following the police search at the premises of local religious community, the criminal proceedings were opened against Samara LRO, and as the result its activities were banned for extremism, and its property confiscated.[210] Moreover, the individual members of the religious organization were prosecuted for engaging in the activities of the extremist group, and the website of the organization was blocked. The applicants claimed violation of their rights under Art. 9 alone and in conjunction with Art. 10, Art. 11 and Art. 14. A later application *Administrative Centre of Jehovah's Witnesses in Russia and Kalin against Russia* (2017) includes complaint regarding the liquidation of all local organizations of Jehovah's Witnesses in general, and the applicant organization in particular, by the decision of the Supreme Court of Russia.[211] The applicants claimed that the activities of the organization were entirely peaceful, and the liquidation constitutes unlawful interference with the their rights under Art. 9 in conjunction with Art. 11 and Art. 14. While it is not likely that the Court would review these cases in the nearest future, it would be interesting to read the analysis

It should be mentioned that the organizations, other than religious, have also complained about interference to their rights under Art. 11, and there are several cases pending before the EctHR. An interesting example is the application *Aleksandr Zhdanov and Rainbow House against Russia* (2008), which concerns, *inter alia*, the refusal of registration of the organization, which

[210] SAMARA LRO and others against Russia and 6 other applications, Application no. 15962/15, http://hudoc.echr.coe.int/eng?i=001-177370

[211] Administrative Centre of Jehovah's Witnesses in Russia and Kalin against Russia, Application no. 10188/17, http://hudoc.echr.coe.int/eng?i=001-179699

activities included the protection of the citizens' sexual rights.[212] The registration authority refused to register the organization (which was already operating without the registration), as it considered it would be an extremist organization, as its activities "might infringe the rights and freedoms of others, jeopardize the constitutionally protected institutions of family and marriage and encourage social and religious hatred and enmity".[213] The national court did not find a violation of the applicant's rights to association, as the organization could still perform its activities without the registration. The applicants claimed, *inter alia*, violation under Art. 11, taken alone and in conjunction with Art. 14.

There are also several individual cases, where the applicants were prosecuted under anti-extremism legislation, pending before the Court. One of such cases is *Terentyev against Russia* (2009), concerns a comment made by the applicant on a popular blog platform, in which he used a very harsh language towards policemen (including suggesting "burning dishonest cops").[214] As a result, he was convicted under anti-extremism provisions of the Criminal Code for inciting hatred and enmity towards a social group, as the national court interpreted that the notion of a "social group" includes policemen. The applicant alleged that such conviction presents an interference with his freedom of expression, protected under Art. 10. Another case, that also involves online activities, is *Podchasov against Russia* (2016), concerns publication (or rather a repost) on the applicant's personal social media page. Thus, he reposted a post, written by another person, that contained a virulent language against Russian people, as a reaction to the events in Ukraine in early 2014.[215] As the result, he was prosecuted for "calls for extremist activities" and for

[212] Aleksandr ZHDANOV and RAINBOW HOUSE against Russia, Application no. 12200/08, http://hudoc.echr.coe.int/eng?i=001-113100

[213] Ibid

[214] Savva Sergeyevich TERENTYEV against Russia, Application no. 10692/09, http://hudoc.echr.coe.int/eng?i=001-160397

[215] Anton Valeryevich PODCHASOV against Russia, Application no. 14856/16, http://hudoc.echr.coe.int/eng?i=001-177579

"incitement to hatred on the ground of nationality via a mass media outlet", and included into the list of person suspected of extremist or terrorist activities.[216] These cases are only a few examples of complaints, pending before the ECtHR. However, they could potentially give the Court opportunity to address the broad application of the anti-extremism legislation in Russia.

3.6 Anti-terrorism and freedoms under Art. 10 and Art. 11: current standards and potential for development

Freedom of expression and freedom of assembly and association are qualified rights under the ECHR, and could be limited on the grounds of Para. 2 of Art. 10 and Art. 11 respectively. In order to see, if the interference with a person's right is permissible under the Convention, the Court applies its analysis, to see whether such interference was "prescribed by law", whether the interference pursued "legitimate aims", and whether such interference was "necessary in a democratic society", as to if there was "a pressing social need" and if the means applied were proportioned to the aims. These are general standards that the ECtHR applies to the cases of alleged violation of freedoms under Art. 10 and Art. 11, which include cases that involve anti-terrorism or anti-extremism measures.

As it could be seen from the analyzed cases, the states may invoke different reasons to justify their interference with human rights by the means of anti-terrorism and anti-extremism, primary being protections of national security, territorial integrity and public order, as well as the rights and freedoms of others. In majority of cases the Court accepts such grounds for justification, because of the nature of terrorist and extremist activities, which pose a threat to security, and may violate human rights of other people. While reviewing the cases, the Court tends to highlight that it is aware of the dangers of terrorism, that it realizes that the fight against terrorism is a sensitive

[216] Ibid

issue and takes the specific context of each county into account in its analysis. Thus, the Court is mindful of situations of conflict with Kurdish population in Turkey, and with Chechen population in North Caucasus in Russia, and underlined this, for example in *Dmitriyevskiy,* in *Demirel and Ateş*. That means that the Court reviews the situation as a whole in each case, and apply its standards, bearing in mind the difficulties of the fight against terrorism.

It is interesting how the Court treats national anti-terrorism legislation in its analysis. Generally, when addressing the issue whether the measure of interference is "prescribed by law", the ECtHR looks if such measure is stipulated in the national law, but also looks into the quality of such law, which should be accessible, and the effects of such law should be foreseeable. In *Gülcü* the Court did not find it necessary to assess the lawfulness of the applicant's conviction under the Criminal Code and under the Law 3713, "in light of examination…from point of view of the "necessity" of interference in a democratic society"[217]. The Court used similar logic in *Dmitriyevskiy*, in which it chose not to analyze the foreseeability of the law, accepted that the domestic courts were "faced with a relatively novel legal issue", and presumed that the measure was prescribed by law, because it further addressed the issue of necessity.[218] It shows that the Court is cautious to review quality of the national legislation in the domain of anti-terrorism and anti-extremism. This is understandable, as fight against terrorism is a sensitive issue, and the states should be allowed to use some discretion to be able to effectively respond to such threat. The Court, therefore, avoids direct criticism of the legislation, choosing rather to focus on its implementation in each individual case.

On the question of necessity of interference, the Court always reiterates the importance of freedom of expression (and of freedom of assembly in relevant cases) in a democratic society, and

[217] *Gülcü v. Turkey*, Para. 108
[218] *Dmitriyevskiy v. Russia*, Para. 82, 83

the need to protect not only favorable ideas, but also those that may offend or shock. For cases under Art. 10 regarding the media, the Court also says that the existence of free media is essential for the people in society to be able to get ideas from to form opinion on matters of public interest. The Court has also repeatedly underlined that even though political speech can be virulent in its nature, however, the level of protection for such speech, because of the importance for the society, is higher, meaning the narrower margin of appreciation for the states. In reviewing cases, where the states claim that applicant's statements or publications present a propaganda of terrorist actions/organization, the ECtHR is looking into a question whether such statements can be considered as inciting violence, when viewed as a whole and in context of a concrete situation. Additionally, the Court may also look into the punishment, and see whether it is proportionate and necessary, and also whether it is applied as to prevent person or media organization from engaging in the same activities. When there is no social pressing need for the measure, or it was applied disproportionately, the Court finds such infringements on rights as not necessary in a democratic society.

From the analyzed cases, it could be seen that the Court is ready to find violations of individual human rights by the states, even in the domain of application of anti-terrorism measures. Thus, in cases of prosecution of media and journalists for publishing "propaganda in support of terrorist organization" or on other anti-terrorism charges in Turkey, the Court found violation of Art. 10, because it interprets propaganda as statements that incite violence, and this does not include those statement that are mere critical of the government (even if written in strong worded language). The Court also said that the journalists, as a rule, should not be punished for publishing statements of other persons (even those, who are outlawed in the state), because otherwise they would be discouraged from doing so, and the public will be stripped of its right to learn information

on the important matters. The Court reiterated that freedom of expression of media can be restricted, however, "particularly strong reasons are needed for this", because of the role of a "public watchdog" that the press takes in the society.[219] Similar standards are applied by the Court in the cases under Art. 11, as it says that there can restrictions on the right to assemble, however such restrictions should be "convincingly established", and national courts should provide "relevant" and "sufficient" reasons for prosecuting persons, who had no violent intentions, for participation in peaceful protests (even if at some point such protests turned to violence).[220] In conclusion, it can be said that the Court can provide a certain degree of protection against states, using anti-terrorism measures to prosecute dissenters, by carefully interpreting every case in a context and finding the infringement on individual rights.

It seems, however, that the Court is reluctant to analyze the national anti-terrorism and anti-extremism legislation, criticize its broadness and impreciseness, as well as notice the patterns of mis-use of such legislation and measures to infringe on rights of those, who do not support the government. This is particularly notable for Turkey, as there are much more cases on such issues before the ECtHR, then from Russia. In fact, *Dmitriyevskiy* was the first case on the matter of mis-use of the measures under anti-extremism law, and was very welcomed by the Russian human rights defenders.[221] The Court should be able to recognize recurrence of inappropriate use of anti-terrorism measures by the states, and address this effectively, as such infringements on the freedoms of expression, assembly and association present not only a danger for individuals rights, but also shut down dissent and ultimately undermines democracy. The Court may consider

[219] Saygili and Falakaoğlu v. Turkey, Para. 23
[220] Gülcü v. Turkey, Para. 112
[221] In Russian: "*Первое дело об экстремизме из России пересмотрено Европейским судом*", Ведомости, ("The first case on extremism from Russia reviewed by the European Court"), 04 October 2017, https://www.vedomosti.ru/politics/articles/2017/10/04/736389-ekstremizme-evropeiskim-sudom

employing the provisions of Art.18, which "has potentially great importance for protecting democratic values", and in future may be used to provide more effective protection from the states, who use anti-terrorism as a pretext to violate human rights.[222] In their partly dissenting opinion in *Navalnyy v. Russia* judges López Guerra, Keller and Pastor Vilanova noted that when a state repeatedly and systematically uses some measure to silence dissent under improper pretext, this could give a rise to application of Art. 18.[223] While there are a number of problematic issues in possibility of application of Art. 18, such as high burden of proof, accessory character of such provision, and others.[224] However, this can be one of the possible ways to address the problem of misuse of anti-terrorism legislation. Ultimately, the Court should be able not only to find individual violations of human rights, but also address the more broad and structural problems in countries such as Russia and Turkey, where anti-terrorism and anti-extremism is constantly used to silence criticism and opposition.

The European Court of Human Right provides a forum for addressing individual human rights violations, that stemmed from the misuse of national anti-terrorism legislation, and a quite effective one. The Court could identify when the states use anti-terrorism measures to infringe on the rights of dissenters and provide redress for such violations. However, it would be even more effective, both for the protection of individual right and for enhancing democratic values, if the Court would also note and address the situations of systematic misuse of such measures to target and silence opposing opinions by such countries as Turkey and Russia.

[222] Helen Keller and Corina Heri, "Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights Untapped Potential to Protect Democracy," *Human Rights Law Journal* 37 (2016): 7.
[223] Navalnyy v. Russia, Judgment from 2 February 2017, 2 February 2017, http://hudoc.echr.coe.int/eng?i=001-170655, Joint Partly Dissenting Opinion of judges López Guerra, Keller and Pastor Vilanova, Para. 2, 4
[224] Keller and Heri, "Selective Criminal Proceedings and Article 18 ECHR," 8–9.

Conclusion

As the threat of terrorism rises, the states tend to use restrictive measures to be able to prevent terrorist attacks and the loss of life. While aimed at prevention of human rights violation, anti-terrorism measures may have the opposite effect of infringing on human rights and limiting their scope. Human rights law allows for some limitations on human rights, which is enshrined in the major international (ICCPR) and regional (ECHR) human rights instruments, however, this does not mean that the human rights are stripped of their protection in the name of anti-terrorism. The proper balance should be found between security issues and human rights, and anti-terrorism measures should be necessary and proportionate.

The states are generally allowed to use reasonable limitations on human rights in fight against terrorism, especially for qualified rights, including freedom of expression and assembly. However, the fight against terrorism may call for employing other modes of behavior, depending on the concrete situation. In times of stress, e.g after the terrorist attack - to deal with consequences, or before to attack - to prevent it (when there is real threat of it), governments may use a state of emergency as a special extra-legal regime with specific rules to be able to adequately react to a situation. Such regime is generally permissible, however, the states may use it extensively, to be able to act extra-legally even without an existence of a real threat. The example of France and a 2-year long state of emergency there shows how the state may use anti-terrorism pretext to curtail human rights. The states may also use measures of militant democracy to protect their "existence" against the "enemies of democracy". Such measures, include, inter alia, banning of totalitarian political parties, and fundamental movements, and they are narrowly aimed at those, who pose a real threat to democracy. However, in the context of terrorism prevention, such measures can become pervasive, and undermine the democracy instead of protecting it. It is necessary to

understand different modes of state's behavior, to be able to recognize when such modes start to infringe on human rights instead of protecting them.

It should be noted that in absence of the unified perception of notion of terrorism, there are still international and regional documents that address different aspects of terrorism and its prevention, as well its interrelation with human rights. The number of documents regulate such issues, as prevention of financing of terrorist organizations, prevention of spread of terrorism by prohibiting incitement for terrorism and its acts, restricting movement for individual terrorist suspects, etc, both at the level of the UN and within the framework of the Council of Europe. While prevention of terrorism is a very important matter and should be regulated, international and regional bodies should be cautious in their regulations, as to not create new infringements on human rights, as it happened in the case with the UN no-fly lists. Moreover, it is important that today's standards and definitions of terrorist-related issues are quite broad, and somewhat inconsistent, which allows states to use such broad interpretation to impose unnecessary restrictions on human rights. International and regional bodies should be cautious about this issue and bear it in mind while drafting new standards, or interpreting old rules.

The examples of national legislation and on terrorism and extremism and practice of its implementation from Turkey and Russia show how states may use such legislation not only for legitimate purposes, such as fight against terrorism and prevention of terrorist activities, but also for persecution of those opposing the government. Turkey in its legislation tends to use terms and definitions specific for its internal issues (such as domestic violence of the PKK), which are still vague written and broadly interpreted by the national courts to be able to prosecute groups and individuals, who do not support the government. Russia, while having legislation specific to terrorism, tend to mostly employ anti-extremist legislation (which also includes terrorism) to

prevent any kind of dangerous behavior from turning into terrorist behavior. However, there are numerous examples of over-restrictive use of such legislation to silence any kind of critique and dissent. While national courts in Turkey and Russia have examples of trying to interpret the law as to limit it to activities, that pose danger and may cause violence, such attempts are not very successful, as the practice of misuse of anti-terrorism and anti-extremism measures continue.

The case-law of the European Court of Human Rights show that it applies its general standards under Art. 10 and Art. 11 to the cases on the restrictive use of anti-terrorism measures. In cases involving the issues of fighting against terrorism, the Court usually recognizes the sensitivity of such topic, and view the case in its entirety in a relevant context. Thus, the Court provides its analysis on whether the interference with the conventional rights is "prescribed by law", pursue a legitimate aim, and is necessary in a democratic society (by assessing if there is "a pressing social need", and if the means used were proportionate to the aim). Even though the Court usually allow a wide margin of appropriation for the states, when a matter of national security is invoked (which is usually the case for claims of human rights violations under anti-terrorism law), in cases regarding freedoms under Art. 10 and Art. 11, the Court always note the importance of such freedoms for democratic society. The Court also says that even though some restrictions on such rights are allowed, such restrictions need to have "particularly strong reasons" for them.[225] In cases concerning the media, the Court also reiterates the role of the media as "public watchdogs', and reminds about the importance of media for forming public opinion.[226] If the states excessively restrict the rights under Art. 10 and Art. 11 in the name of fighting terrorism, the Court is able to note this and find violations of relevant provisions as not necessary in a democratic society.

[225] Saygili and Falakaoğlu v. Turkey, Para. 23
[226] Ibid

It should be said that the Court is cautious to analyze the "quality" of national anti-terrorism legislation, and recognize the pattern of state's behavior, when it misuses national anti-terrorism measures. While, it is positive that the Court can provide a level of protection for persons, whose rights were violated by the state, if would be more effective if the Court were able to address the systematic situations, such as in Turkey and Russia. One of the possible ways for that is using provisions of Art. 18 of the Convention. While there are problematic issues in application of the provision under Art. 18 (e.g. the high burden of proof), this could be an opportunity for the Court to expand its practice and be able to address situations, when anti-terrorism measures are used to suppress opposing views by the governments.

Anti-terrorism is important and necessary in modern society, as it may help prevent terrorist acts. However, when it becomes too pervasive and excessively infringe on human rights, it may undermine democracy. As one of the main purpose of anti-terrorism is to preserve democracy and human rights, it is important to be able to recognize instances of anti-terrorism misuse and prevent such instances. The values at stake here are too important to give up human rights that easily.

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